TABLE OF CONTENTS

Page

EXCERPTS FROM REPORTER'S TRANSCRIPT 1

Testimony of Thurmon L. Radford:
- Direct Examination 3
- Cross-Examination 12

Testimony of Willis Heldreth:
- Cross-Examination 13

Testimony of M. Birney Wright:
- Direct Examination 14
- Cross-Examination 17
- Redirect Examination 19

EXHIBITS:

- G. C. Exhibit 10 19
- G. C. Exhibit 11 22
- G. C. Exhibit 12 23
- G. C. Exhibit 14 24
- G. C. Exhibit 15 25
- G. C. Exhibit 17 26
- G. C. Exhibit 18 28
- G. C. Exhibit 21 29
- G. C. Exhibit 23 30
- G. C. Exhibit 27 31
- Exhibit R. 1 33
- G. C. Exhibit 4a 34
- Exhibit R. 4 35

Page

BOARD'S DECISION AND ORDER 36

Order 40

INTERMEDIATE REPORT 42

Statement of the Case 42

Findings of Fact 43

I. The Business of the Respondent 43

III. The Unfair Labor Practices 44

A. The Issues 44

B. The Facts 45

C. Conclusions 60

IV. The Effect of the Unfair Labor Practices Upon Commerce 68

V. The Remedy 68

Conclusions of Law 69

Recommendations 71

Appendix 74

MOTION OF RESPONDENT 76

	Original	Print
Proceedings in the U.S.C.A. for the Fourth Circuit	2a	1
Appendix to respondent's brief—see separate index	2b	1
Argument and submission (omitted in printing)	26	25
Opinion, Dobie, J.	28	25
Dissenting opinion, Soper, J.	36	32
Judgment	39	33
Clerk's certificate (omitted in printing)	41	
Order allowing certiorari	42	34

United States Court of Appeals for the Fourth Circuit

No. 7127

OLIN MATHIESON CHEMICAL CORPORATION,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

On Petition for Review of an Order of National Labor Relations Board

APPENDIX ON BEHALF OF PETITIONER

EXCERPTS FROM REPORTER'S TRANSCRIPT May 16, 1955

[TR. PP. 12-15]

MR. THACKERY: Mr. Examiner, we have been given the privilege of looking at Company records, by counsel, in respect to certain seniority problems involved in the case regarding 8(3)s which have been alleged, and after examination of the records it is the conclusion of counsel of the General Counsel and the Charging Parties herein that certain individuals alleged should be omitted from the com-

plaint in view of the fact that an examination of these records shows the individuals whom we shall name would have been laid off by the company even under former security seniority regulations.

We understand that if the six individuals are omitted that Company counsel would stipulate that the remaining seven were laid off on or about April 9, 1954, pursuant to the seniority provisions submitted to the union on April 2, 1954 by the Company, and that these individuals under the seniority system prevailing prior to April 2, 1954 would not have been laid off on or about April 9th.

* * *

MR. STULL: I have one suggestion, Mr. Trial Examiner, in connection with identification of the seniority existing prior to, I think — I think Mr. Thackery said prior to April 2nd.

* * *

* * * My suggestion would be that you refer to the prior seniority as the seniority that existed under the contract.

* * *

MR. THACKERY: Counsel for the General Counsel at this time requests oral stipulation that the seven individuals named in the Complaint, as amended, namely Robert Permar, Francis Ruggerio, Michael D. Eddy, Sr., Wayne O. Mayfield, Herman Morris, C. B. Smyth and Elwood Frum, were laid off by the company on or about April 9, 1954, pursuant to certain seniority provisions submitted to the union on April 2, 1954, and that these individuals under the seniority system prevailing prior to April 2, 1954 under the contracts, General Counsel's Exhibits 4(a), (b) and (c), would not have been laid off on April 9, 1954, and that, in case of each of these seven individuals, an individual or individuals of less seniority under the contracts who re-

turned to work during the strike period February 4th to March 17th was or were retained in employment. Will counsel so stipulate?

MR. STULL: Counsel will so stipulate.

* * *

[TR. PP. 34]

MR. THACKERY: I propose at this time an oral stipulation that Raymond C. Sansbury, S-a-n-s-b-u-r-y, returned to work during the course of the strike, and was retained in the employment of the company although he had less seniority under the system prevailing prior to April 2nd than Francis Ruggerio. Will counsel so stipulate?

MR. STULL: I think the stipulation, if it is to be made, should be to the effect, as well, that Raymond C. Sansbury engaged in the strike and was active in the strike.

MR. THACKERY: That can be stipulated.

TRIAL EXAMINER: If you want to include that, it is agreeable. The witness has testified to it.

MR. THACKERY: Will counsel so stipulate?

TRIAL EXAMINER: With that amendment?

MR. STULL: Yes.

* * *

Testimony of Thurmon L. Radford

DIRECT EXAMINATION

[TR. PP. 38-41]

BY MR. THACKERY:

Q Your name is Thurmon Radford?

A That is correct.

Q You are business representative of Local 152 of the Pipe Fitters?

A Yes, sir.

* * *

Q Have you, within the last several years, represented your union in negotiations with Mathieson and Olin?

A I have.

Q When did you last begin negotiations with this company, Mr. Radford?

A November, 1953. When you say "last begun" I assume you mean the series of events leading up to this time.

Q That's right. What did you do on or about November 24th, 1953?

A I sent the company a letter notifying them of our desire to modify the terms of the collective bargaining agreement between the company and our union.

* * *

BY MR. THACKERY:

Q I show you General Counsel's Exhibit 6 for identification and ask you what that is.

A It is a letter from the Mathieson Chemical Corporation, acknowledging our letter and advising us that they, too, had intentions of modifying the agreement, and stating that they would set a mutually agreed-upon time for a meeting at a later date.

* * *

BY MR. THACKERY:

Q Did you at any time during the course of the negotiations represent any other unions, Mr. Radford?

A Yes, sir. Prior to beginning negotiations with Mathieson Chemical Corporation we held a joint committee meeting between the three AF of L unions that represented

certain of the employees, certain maintenance employees of the Mathieson Chemical Corporation, and I was chosen as the spokesman for the three unions, and by the "three unions" I mean the IBEW, Local 425, and the Carpenters.

Q If you know, did the other unions, regardless of the fact that you represented them, did they also notify the company?

A They did.

* * *

[TR. PP. 44-46]

BY MR. THACKERY:

Q Did you thereafter — and I refer to the notification, Mr. Radford — did you thereafter meet with the company in bargaining sessions?

A I did.

Q Can you describe how many meetings there were, to the best of your recollection, and when they occurred? The period in which they occurred?

A The negotiation sessions began on or about January the 10th, 1954, and between that date and February — and February 10th, 1954 — we held approximately twelve negotiating sessions.

Q Do you recall meetings on February 17th?

A Yes, sir.

* * *

Q Do you recall a meeting on February 24th, Mr. Radford?

A Yes, sir.

Q What was significant about that meeting, if anything?

A On February 24th, that was about the eve of the

strike, I think. During the course of negotiations the Federal Mediation and Conciliation Service people were present, and they discussed the various issues with us, * * *

* * *

BY MR. THACKERY:

Q I show you General Counsel's Exhibit 10 for identification, and ask you what that is.

A This is a copy of a telegram that was sent to the Federal Mediation and Conciliation Service in behalf of the three AF of L local unions involved in this proceeding, and in behalf of the Mathieson Chemical Corporation.

Q Were you present when this telegram was sent?

A Yes, Mr. Kileen and I left the plant property and came over to the telegraph office together, and sent the telegram and shared the cost of sending it.

* * *

[TR. PP. 48-51]

Q All right. Did you take any action with respect to the three unions in anticipation of your difficulties, or did your difficulties create any situation about which you took any action?

A We took a strike vote.

Q When did you take that, Mr. Radford? About when did you?

A It was in the week of the 17th there, and we had advised the company, as I recall, at that time, that we intended to strike on February—midnight, February the 24th, as I recall.

Q Did the strike actually take place?

A Yes, sir.

Q And you say it took place on the 24th?

A Yes, sir.

Q Is that right?

A Midnight.

Q How long did it last?

A Until March 17th at noon. Noon, March 17, 1954.

* * *

BY MR. THACKERY:

Q I show you General Counsel's Exhibit 11 for identification, and ask you what that is.

A It is a copy of a letter sent from the Mathieson Chemical Corporation to me under date of March 15, 1954, advising me that the company would start to interview applicants for some of the jobs which were formerly filled by striking employees.

* * *

Q Did you do anything else at that time?

A Well, I was contacted by a citizen's committee that had been formed during that period of time. I was also contacted by the State Department of Labor. I mean they sent me a telegram and asked me if we would be willing to meet with one of their representatives, and we replied that we would, and I was later told that the company had took the position that any meetings that were brought about would have to be brought about through Federal Mediation and Conciliation Service. * * *

They [the citizens' committee] contacted me two or three times on the evening—on the evening of the 16th of March—and asked me eventually—eventually they said, "If this citizens' committee would request you to return the striking employees to work at the plant, and negotiations would be resumed, and you return them to work under the terms of the old agreement, would you be agreeable?"

I advised them that I would, and I did return the employees to work at noon the next day.

Q Did that include members of all of the unions?

A That's correct.

* * *

[TR. PP. 55-57]

BY MR. THACKERY:

Q Did you have a meeting at about this time, Mr. Radford?

A Yes, sir.

Q Do you remember when the meeting was?

A April 2, 1954.

* * *

BY MR. THACKERY:

Q I show you General Counsel's Exhibit 15 for identification and ask you what that is.

A It is a copy of the seniority proposal of the company, which was made April 2, 1954, at that meeting.

Q Can you describe the circumstances of the presentation, if it was presented? That proposal?

A Yes, sir. At this meeting when we went into this session I sought the company's position with respect to reaching an agreement with our union and was advised that the company had an all-inclusive proposal to make. They offered to sign an agreement with us for, as I recall it, for one year from date of signing, including all of the clauses which we had tentatively agreed upon prior to the strike, with no change—with one exception. That dealing with seniority. And they stated on the matter of seniority they proposed this seniority clause, and that it would give seniority for layoff purposes to all employees who remained at

work during the strike or who crossed the picket line or who were hired during the course of the strike, over and above the employees who remained away from work during the entire duration of the strike.

They further announced that they were going to lay off ninety-four men in the maintenance department on April 9th, which was one week from that meeting, and that they intended to lay them off in accordance with this policy.

Q And you are referring to General Counsel's Exhibit 15 when you say "this policy"?

A That is correct; and the other item, they proposed no change whatsoever in wage rates. I told them that the proposal was ridiculous and that I could probably make one that would be just about as ridiculous, to put those employees on the other end of the seniority list, and that proposal was totally unacceptable to the unions, and then I was asked by Mr. Kileen whether or not we wanted the company to leave the proposal open for a period of five days.

I replied that he could leave it open indefinitely as far as I was concerned. That we would never agree to it.

Q Were there other lay-offs made on April 9th, other than maintenance employees, if you know?

A Yes, sir.

Q What were the types of employees laid off?

A They laid off ninety-four maintenance workers and approximately sixty production workers.

Q When you say ninety-four maintenance workers, are you referring to job classifications covered by the certifications as listed in the complaint, or let me put it another way.

Are you referring to the job classifications of employees represented by the three unions involved in this proceeding?

A Those, and some others that were outside of the unit, but by and large they were in our unit. * * *

* * *

[TR. PP. 60-62]

BY MR. THACKERY:

Q I show you General Counsel's Exhibit 17 for identification and ask you what that is.

A That is the reply from the Mathieson Chemical Corporation to me, a reply to the letter we were just discussing.

Q What did you do as a result of this letter, if anything?

A Well, in this letter the company stated that they saw nothing to be gained in meeting with us, and that if they did meet with us they felt it would be futile, and so—the letter—I took the letter as a refusal to me.

* * *

BY MR. THACKERY:

Q I show you 18 for identification and ask you what that is.

A It is a letter that I received from the Mathieson Chemical Corporation under date of February 12, 1955, stating that they hadn't heard from me since April 27th, and making certain proposals to the union.

* *

BY MR. THACKERY:

Q To your knowledge did the other unions receive notification of this kind?

A They did.

* * *

BY MR. THACKERY:

Q I will show you 19 for identification and ask you what that is.

A It is a letter that the Mathieson Chemical Corpora-

tion gave to the present president of the Carpenters' Local Union, who in turn gave it to me, and it contains the same information as contained in—practically the same as in the letter you just put in.

Q Do you know whether or not IBEW, Local 425, received such a letter?

A I was advised by Mr. Berry, the business agent, that they did.

* * *

[TR. PP. 64-66]

BY MR. THACKERY:

Q I show you General Counsel's 21 for identification and ask you what that is.

A That's a letter from the Mathieson Chemical Corporation under the date of February 21, 1955, setting the time and place for the meeting.

* * *

BY MR. THACKERY:

Q Did you, in fact, have a meeting on March 3rd, Mr. Radford?

A We did.

Q Were you, in fact, representing the Pipe Fitters, as well as Local 425 and Local 1369?

A Each of the unions had people there, but I was continuing the same as we had throughout the negotiations.

* * *

[TR. PP. 69-70]

BY MR. THACKERY:

Q I show you what has been marked General Counsel's Exhibit 26 for identification and ask you what that is.

A It is a letter that our attorney, Martin F. O'Donoghue, sent to the Mathieson Chemical Corporation, declin-

ing to execute the proposed agreement they had sent us because they contained the seniority—strike seniority—provisions, * * *

* * *

CROSS-EXAMINATION

[TR. PP. 96-98]

BY MR. STULL:

Q Did you reach any agreements with the company after February 10th, 1954?

A Well, we agreed to — we agreed to meet at a mutually agreed-upon time and place, and different things of that nature. I am at a loss to know what you mean when you say did we make agreements. If you are asking do we have a written collective bargaining agreement as a result of negotiations, the answer is no, we don't have up to and including today, * * *

* * *

Q Did you meet during the strike with the company?

A Yes, we had, as I recall it, one meeting during the strike, at the Hotel Morgan, which meeting was arranged by Mr. Rose and Mr. Gantz of the Federal Mediation and Conciliation Service, * * *

* * *

Q You don't remember that the Federal Mediation Service advised both parties that they should hold themselves in readiness for call by the Mediation Service?

A Do you want me to tell you what the Federal Mediator told me?

Q Answer my question.

TRIAL EXAMINER: I assume if he wants to know he will ask you. Just answer his question. If you can't answer it, say you can't.

THE WITNESS: The Federal Mediator told me that he felt the meeting would bring about no fruitful result, and he was going to Philadelphia. That's what he told me.

* * *

Testimony of Willis Heldreth

CROSS-EXAMINATION

[TR. PP. 107-108]

BY MR. STULL:

Q Mr. Heldreth, you say you were on the negotiating committee or you were a steward and you were on the negotiating committee attending the meeting of April 2, 1954?

A That is correct.

Q And you also attended the one on March 3, '55?

A That is correct.

* * *

Q And, Mr. Heldreth, who else represented the Electricians on the committee on the April 2nd meeting?

A Mr. Berry.

* * *

Q Do you know Mr. Ziakus?

A Yes, I do.

Q Was he a member of the negotiating committee?

A He was prior to the strike, but after the strike he sort of faded away.

Q Was he on strike at any of the time?

A Yes.

Q Were you on strike, Mr. Heldreth?

A Yes.

Q Were you a steward at that time?

A Yes, sir.

* * *

Testimony of M. Birney Wright

DIRECT EXAMINATION

[TR. PP. 151-152]

BY MR. STULL:

Q Mr. Wright, where are you employed?

A Employed by Olin Mathieson Chemical Corporation, Morgantown, West Virginia.

Q In what capacity, Mr. Wright?

A As plant manager of the Morgantown operation.

Q How long have you been so employed?

A Since September, 1951.

Q Are you familiar, Mr. Wright, with the circumstances surrounding the layoff that was made in the maintenance forces involved in the bargaining units in this proceeding on April 9, 1954?

A I am.

Q And, Mr. Wright, did you have anything to do with the determination of that layoff?

A Yes, I did.

Q What gave rise to that, Mr. Wright?

A Well, one of my main responsibilities is to see that the plant is operated as efficiently and as economically as possible. One of our major costs is maintenance cost, and that is a cost which is under continuous study. This particular time I started a study in October of 1953 of the maintenance force requirements. * * *

* * *

[TR. PP. 155-160]

TRIAL EXAMINER: May I interject just at this point? This would be material if there were any allegations in the complaint that the general layoff itself was discriminatory. That is not your claim.

MR. THACKERY: That is right.

TRIAL EXAMINER: You will concede, will you, the layoff was for economic reasons?

MR. THACKERY: Well, the —

TRIAL EXAMINER: I think the mere fact there was a layoff justifies Mr. Stull in explaining what it was, but since you concede it was not — the layoff itself — was not an unfair labor practice, all he wants to do is establish it was done for economic reasons — if you will concede that point I think we need have no further questions on the point.

MR. THACKERY: I couldn't make any concessions respecting the ninety-four inasmuch as they include the seven. I will concede the origin of the layoff may have been economical.

TRIAL EXAMINER: Well, as I understand it, you are not even claiming there was no necessity to lay off seven individuals. All you are claiming is in selecting those individuals—

MR. THACKERY: That is right, precisely.

TRIAL EXAMINER: Then the entire layoff, you are willing to concede, the general layoff, was for economical reasons?

MR. THACKERY: Yes, I will concede that.

* * *

BY MR. STULL:

Q Mr. Wright, you are familiar with the fact that there were certain individuals who were retained on the payroll,

even after the April 9th layoff, though they had in some cases less seniority than some others who were laid off,—and I say "seniority"—I mean working group seniority—were you not?

A Yes.

Q Did you have anything to do, Mr. Wright, with the retention of those people?

A I had the privilege of expressing my views with respect to those men to proper authorities in the corporation who made the final decision as to what our action would be.

Q What was your recommendation, Mr. Wright?

A Again, my prime responsibility is to keep the plant operating, and I felt —

TRIAL EXAMINER: Not what you felt. What was your recommendation? That was the question, Mr. Wright. Let's just stick to that question.

THE WITNESS: My recommendation was that since in my opinion we owed these men an obligation for as much job security as possible, that if at all possible they should be retained in the work group.

BY MR. STULL:

Q You are referring now to the men who returned to work or remained at work during the course of the strike, during which time the plant continued to operate?

A That is correct.

Q Mr. Wright, there were many employees not represented by the unions involved in this proceeding who were working or employed by the company at that plant?

A Yes.

Q Did they continue to work during the strike?

A Yes, they did.

Q * * * Since the layoff of April 9th, Mr. Wright, what has been your experience at the plant with the performance of maintenance work?

A It has been adequate.

Q Has there been any appreciable change in the size of the maintenance work groups which were involved in the layoff of those represented by the unions that are involved in this proceeding?

A No appreciable change. We did underestimate the number required in the welding group because of an unexpected amount of welding that came up, and we did recall two welders that I am sure of.

Q But since April 9th you said there has been no appreciable change up to this time?

A No.

Q In the maintenance field?

A No.

MR. STULL: That's all I have.

TRIAL EXAMINER: Mr. Thackery, any questions?

CROSS-EXAMINATION

BY MR. THACKERY:

* * *

Q Are you familiar with the clause of the contract—and I refer to the agreement between Mathieson Chemical Corporation and the United Brotherhood of Carpenters and Joiners and the other two unions involved in this proceeding—as follows:

"If the operation of this seniority clause"—and I refer in

this respect to the old seniority clause—prior to April 2nd —and also applies to the new clause shown in General Counsel's Exhibit 24(a), (b) and (c), as follows:

"If the operation of this seniority clause"—and that refers to both seniority clauses—"tends to eliminate skills which would be required in an efficient operation of the plant, the union will work out with the company a program which will permit the retention of skills necessary to continue efficient operation of the plant."

Are you familiar with those clauses?

A I am. — I believe I have read them, yes.

Q Did you consult the pipe fitters, the carpenters, and/or the IBEW, with respect to these skilled layoffs?

A No.

TRIAL EXAMINER: Well, let me ask you this. Are you claiming the contract was in existence at that time?

MR. THACKERY: The clause which I have just quoted not only exists in the original contracts, that is, General Counsel's Exhibits 4(a), (b) and (c), but it exists in the proposed contracts, General Counsel's Exhibits 24(a), (b) and (c).

TRIAL EXAMINER: That may be a fact, but are you claiming that at the time—at that time in April, or when the recall—after the April layoff—that there was any contract in existence, or had there been any contract in existence since February 10th?

MR. THACKERY: Well, it seems to me a good-faith bargaining posture or position would require, in view of the fact they were attempting to put a unilateral alteration of seniority into the effect, would require at least some attention to the old clause and also in the new clause respecting the operation of any seniority clause.

TRIAL EXAMINER: That would work both ways, wouldn't it?

MR. THACKERY: The union wasn't called in.

TRIAL EXAMINER: There was a no-strike clause.

MR. WARD: That contract expired.

TRIAL EXAMINER: That's my point.

* * *

REDIRECT EXAMINATION

[TR. PP. 162-163]

BY MR. STULL:

Q Mr. Wright, with respect to this layoff list, was the size of the layoff determined in March, or was that earlier?

A That was determined earlier than March, yes.

Q When did you conclude the size of the layoff involving these groups?

A The early part of February, 1954.

* * *

EXHIBITS

G. C. Exhibit 10

2-10-54

Martin J. O'Connell, Director Federal Mediation and
Conciliation Service
144 Tariff Building
8th and F Sts N.W.
Washington 25 D.C.

Dear Sir:

A dispute exists within the meaning of Sec 8(d) of the Labor Management Relations Act between the unions and

the Company listed below

The 60 day notice required by law was filed by the U. A. of Journeymen & Apprentices of the Plumbing & Pipefitting Industry, Local 152 on November 24, 1953, by the United Brotherhood of Carpenters and Joiners of America Local 1369 on November 12, 1953 and by the International Brotherhood Electrical Workers Local 425 on Dec 8 1953.

All these unions are AFL

Their addresses are as follows

I.B.E.W. Local 425 Room 218 Professional Bldg Fairmont W. Va. Attention W. A. Berry Business Agent phone Fairmont 2869 or Core 2R8

Carpenters Local 1369 c/o C. B. Smyth, Pres., 311 Spruce St., Morgantown, W. Va., Phone 6137

Pipe Fitters Local 152, Attention Mr. Thurmon Radford Business Agent 231 Chestnut St., Morgantown, W. Va., Phone 4631, Res. 8818

The name of the Company is Mathieson Chemical Corporation, Morgantown Operations, Morgantown, W. Va. Attention M. B. Wright, Manager Phone 3491.

The Company is a chemical plant manufacturing ammonia and other chemical products employing approximately 1050. Approximately 234 employees are involved in this dispute.

The three unions jointly and the company have been attempting to renegotiate a contract expiring Feb. 10, 1954. A number of items have been agreed upon. A number of items including a wage increase, certain additional fringe benefits, and other proposed contractual clauses are in dispute.

Both parties have reached a point where agreement

appears impossible. A strike has been threatened any time after midnite Feb. 10, 1954. To avoid this it is imperative that as soon as possible, mediation and conciliation machinery be used in an attempt to reconcile the differences.

This notice is being filed on behalf of all parties listed below.

Mathieson Chemical Corp., Morgantown Operation

M. B. WRIGHT

International Brotherhood of Electrical Workers Local 425

W. A. BERRY

United Brotherhood of Carpenters and Joiners of America Local 1369

C. B. SMYTH

United Assoc of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry Local 152

T. L. RADFORD

G. C. Exhibit 11

March 15, 1954

Mr. Thurmon L. Radford
Business Agent
United Association of Journeymen &
Apprentices of the Plumbing & Pipe
Fitting Industry of the United
States and Canada
Local Union No. 152
231 Chestnut Street
Morgantown, West Virginia

Dear Sir:

You will be interested in knowing that on Wednesday, March 17, 1954, the Company will start to interview applicants for some of the jobs which were formerly filled by striking employees. This is information which I felt is in your interest to know.

Yours very truly,

(s) M. B. WRIGHT
M. B. WRIGHT
Manager

MBW:bt

G. C. Exhibit 12

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA

LOCAL UNION 152, MORGANTOWN, W. VA.

March 23, 1954

231 Chestnut Street
Morgantown, West Virginia

Mathieson Chemical Corporation
P. O. Box 888
Morgantown, West Virginia

Gentlemen:

On March 15, 1954 I telephoned the Mathieson Chemical Corporation and requested that negotiation between the Mathieson Chemical Corporation and the 3 AFL Unions, which represent certain of the Company's employees, be resumed. After conferring with Mr. A. S. Gilliam and Mr. Kileen, Mr. Kileen advised me, in part, to relay my proposal of resuming negotiations to Mr. William Rose of the Federal Mediation and Conciliation Service.

On March 15, 1954 I contacted Mr. William Rose of the Federal Mediation and Conciliation Service, and advised him that it was the desire of the 3 AFL Unions to resume negotiations. I was informed by Mr. Rose that Mr. A. A. Ahner (a Company Representative) would not be available for a meeting with us during the week ending March 20, 1954.

We hereby offer to meet and confer with the Representatives of the Company for the purpose of negotiating further

on the unresolved issues and looking toward the fulfillment of our mutual obligation—the execution of a written agreement.

Sincerely yours,

THURMON L. RADFORD
Business Agent
Local Union No. 152

vr

Registered Mail — Return Receipt Requested

G. C. Exhibit 14

MATHIESON CHEMICAL CORPORATION

March 30, 1954

Registered Mail
Return Receipt Requested

Mr. Thurmon L. Radford
Business Agent
United Association of Journeymen &
Apprentices of the Plumbing & Pipe
Fitting Industry of the United
States and Canada
Local Union No. 152
231 Chestnut Street
Morgantown, West Virginia

Dear Sir:

This is in reply to your letter of March 23, 1954. We will meet with you at a time mutually convenient to consider such matters as may be germane. I would suggest

Friday, April 2, as a date for meeting provided this is agreeable to you and your committee.

Yours very truly,

(s) A. S. GILLIAM
A. S. GILLIAM
Asst. Manager

ASG:bt

G. C. Exhibit 15

ARTICLE IV, SEC. 5(a)

PAR. 2 OF 3 PAR.

Anything in this Article IV on seniority to the contrary notwithstanding, employees in the journeyman classification and employees in the Helper Classification within a Work Group covered by this Contract who were not at work from February 25, 1954, until at or after noon on March 17, 1954, shall be laid off before any employee so classified in the same Work Group who remained at or returned to work or was hired during the period from February 25, 1954, to noon March 17, 1954, is laid off.

G. C. Exhibit 17

MATHIESON CHEMICAL CORPORATION

April 27, 1954

Registered Mail
Return Receipt Requested

Mr. Thurmon L. Radford
Business Agent
United Association of Journeymen &
Apprentices of the Plumbing & Pipe
Fitting Industry of the United
States and Canada
Local Union No. 152
231 Chestnut Street
Morgantown, West Virginia

Dear Sir:

This is in reply to your letter of April 20, 1954.

As you know, we negotiated for several months regarding the renewal of the three A.F.L. contracts which expired simultaneously on February 10, 1954.

The only issue was a wage increase which we opposed. Your group went out on strike to enforce your demand for a wage increase.

We told you repeatedly in meetings before and during the strike, and in one meeting held after the strike, that there could be no wage increase granted this year, giving you our reasons therefor in detail many times.

As a result of the strike, certain new issues arose.

At the meeting after the strike on April 2, 1954, we stated the conditions under which we would sign an agreement and you said those conditions were totally unacceptable to you

and you could never agree to them. We stated that our offer would remain open for five days.

We next heard from you on April 15, asking for a meeting to discuss "the unresolved issues". We told you that we do not propose to sit in a series of futile meetings repeating our respective position and asked that you submit any new proposal in writing.

You have now done so. You still propose a wage increase, although we have told you in many meetings over a period of several months that we could not grant a wage increase. You totally ignore the new issues which arose as a result of the strike. Your position is utterly unrealistic. It illustrates the futility of further meetings on questions regarding which we are apparently hopelessly in opposition.

We are forced to reject the proposals contained in your letter of April 20. It is unnecessary to cite reasons which have been given to you so many times before.

We see nothing to be gained in a meeting such as you propose. You know our position too well to waste your time and ours in futile discussions of previously rejected proposals.

Yours very truly,

(s) M. B. WRIGHT
M. B. WRIGHT
Manager

MBW:bt

G. C. Exhibit 18

February 12, 1955

Registered Mail
Return Receipt Requested

Mr. Thurmon L. Radford
Business Agent
United Association of Journeymen &
Apprentices of the Plumbing & Pipe
Fitting Industry of the United
States and Canada
Local Union No. 152
231 Chestnut Street
Morgantown, West Virginia

Dear Sir:

We have not heard from you since we wrote you April 27, 1954. We now reinstate the proposal made by us in that letter and the proposal we made in our meeting with you on April 2, 1954, ammended, however, as follows: We propose to increase the straight time hourly wage rates for any employees which you may represent in the amount of 3¢ per hour effective February 13, 1955; provided we receive your concurrence. We will be glad to receive your concurrence in writing and if you prefer to confer with us, you may do so.

Awaiting your response.

Yours very truly,

(s) M. B. WRIGHT
M. B. WRIGHT
Manager

MBW:bt

G. C. Exhibit 21

February 21, 1955

Registered Mail
Return Receipt Requested

Mr. Thurmon L. Radford
Business Agent
United Association of Journeymen &
Apprentices of the Plumbing & Pipe
Fitting Industry of the
United States & Canada
Local Union No. 152
231 Chestnut Street
Morgantown, W. Va.

Dear Sir:

This will acknowledge the receipt of your letter of February 15, 1955, in which you advised us that, with certain provisions, you do now wish to confer with us.

We will confer with you on such matters as may be appropriate for bargaining. We suggest that the meeting be held at the office of the Morgantown plant of the Company at 10:30 A. M. on March 3, 1955. Let us know if the time and place are satisfactory.

Yours very truly,

(s) M. B. WRIGHT
M. B. WRIGHT
Manager

MBW:bt

G. C. Exhibit 23

LOCAL UNION 152, MORGANTOWN, W. VA.

March 14, 1955

231 Chestnut Street
Morgantown, West Virginia

Olin-Mathieson Chemical Corporation
P. O. Box 888
Morgantown, West Virginia

Gentlemen:

In accordance with the discussions that Representatives of United Association Local Union No. 152, I.B.E.W. Local Union No. 425, and Carpenters Local Union No. 1369 had with your Representatives on March 3, 1955, we herewith accept the entire proposals of your Company, unconditionally, which are as follows:

1. Increase of three cents ($.03) per hour for all employees represented by the above Local Unions.
2. All of the proposals which were tentatively agreed upon prior to the strike.
3. A One-Year Agreement.
4. Seniority Provision proposed by you on April 2, 1954, and against which an Unfair Labor Practice Charge is now pending before the National Labor Relations Board, will be held in abeyance until the Board renders its decision.

   If the Board determines that your proposed provision is legal, then the Contract will be amended to include it.

   If the Board determines that the provision is illegal

then the Seniority Provision of the last Contract shall be included in the present Contract by amendment.

If you will draft contracts and forward them to us, we will execute them.

Sincerely yours,

THURMON L. RADFORD
Business Agent
U. A. Local Union No. 152

vr

G. C. Exhibit 27

April 7, 1955

Registered Mail
Return Receipt Requested

Mr. Thomas X. Dunn
Suite 831 Tower Building
Washington 5, D. C.

Dear Mr. Dunn:

The proposal of the Company made to the three unions March 3, 1955, was carefully explained, and I believe you will recall having clarified the strike-seniority proposal for Mr. Radford during the meeting. In order that there would be no misunderstanding, we offered to furnish to the unions copies of all revised articles, and did so with certain exceptions at the meeting on March 3. The other revisions including the one on strike-seniority were sent to Mr. Radford following the meeting with our letter of March 3.

Mr. Radford advised us by letter dated March 14 that the three unions "unconditionally" accepted the proposal

made by the Company, and we forwarded to Mr. Radford 6 copies of each of the three contracts for execution as required by him. The Company, as we indicated in our letter of March 21, is ready and willing to execute the contracts sent the unions embodying the agreements reached by the parties' good faith in collective bargaining.

We had hoped to expedite contract execution by sending them all to Mr. Radford as he suggested, and we advised him that we would execute them for the Company upon their return, signed, to us.

We look forward to consumating the agreement reached by the Company and the three unions through executioin of the contracts sent Mr. Radford which embody that agreement.

Yours very truly,

M. B. WRIGHT
Manager

MBW:bt

Encs: Copy letter T. L. Radford to Olin Mathieson dated March 14

Copy letter M. B. Wright to T. L. Radford dated March 21

cc: Thurmon L. Radford

Exhibit R.1

March 3, 1955

Registered Mail
Return Receipt Requested

Mr. Thurmon L. Radford
Business Agent
United Association of Journeymen &
Apprentices of the Plumbing & Pipe
Fitting Industry of the United
States & Canada
Local Union No. 152
231 Chestnut Street
Morgantown, W. Va.

Dear Sir:

These are extra copies of items tentatively agreed to which we promised to send you in addition to the items given you today.

Article IV, you will note, incorporates the revision to Section 5 to reflect the proposal made by the Company during the April 2, 1954, meeting.

Yours very truly,

(s) A. S. GILLIAM
A. S. GILLIAM
Asst. Manager

ASG:bt
Attachments

G. C. Exhibit 4a

ARTICLE II

UNION SECURITY AND CHECKOFF

Section 1. (a) It is understood and agreed that for the duration of this Agreement all employees within the terms of this Agreement shall become and remain members in good standing of the UNION as a condition of employment by the COMPANY. All present employees covered by this Agreement shall, on the thirty-first day from the date of this Agreement, become members of the UNION and shall thereafter remain members of the UNION in good standing as a condition of employment by the COMPANY. All employees hired after the effective date of this Agreement shall, on the thirty-first day from the date of their employment, become and remain members in good standing as a condition of employment by the COMPANY.

(b) At the end of each week, the COMPANY will furnish to the designated representative of the UNION a list of the names, payroll numbers, and hiring dates of all new employees.

Section 2. The UNION reserves the right of disciplining its members for violation of its laws, rules and agreement.

Section 3. Provided each affected employee shall have signed an Authorization for Payroll Deduction and shall have filed a copy of the same with the COMPANY, the COMPANY shall check off, from its employees' wages, Union Initiation Fees and Monthly Dues. The amount of dues and initiation fees shall be certified to the COMPANY by the UNION on or before the 10th day of each month. The sum so collected shall be transmitted to the UNION

along with a statement showing the names and the amount so deducted from each employee on or before the last day of each month.

ARTICLE XVIII

DURATION CLAUSE

Section 1. This Agreement shall become effective as of February 10, 1953, and shall continue in full force and effect until February 10, 1954, and from year to year thereafter unless either party mails notice to the other by Registered Mail at least sixty (60) days prior to February 10, 1954, or any later anniversary date of the Agreement, as to its intention to modify or terminate the Agreement. Thereupon the parties shall initiate negotiation no later than thirty (30) days prior to the anniversary date.

Section 2. This Agreement shall be subject to amendment at any time only by mutual consent of the parties hereto. Such amendment shall be reduced to writing, state the effective date of the amendment, and be executed in the same manner as is the Agreement.

Exhibit R.4

[TR. PP. 5-6]

DUNN: I agree with all you've said. But I don't understand this. The thing that is sticking in the Union's craw is that you've changed the seniority provisions. To continue satisfactory relations the Company should concede as much as it can. The Union went out on an economic strike, however, no increase was given. It seems as though your seniority proposal is punitive. You should withdraw it.

STULL: Our action was not punitive. I feel our action will not change the opinion of the men who share with us

the objective of keeping the plant running. In continuing the operation of this plant we had some help and we continued. We have an obligation to the people here as well as to the officers and stockholders. Any assistance we get is of paramount importance. We should be able to offer people stability. We have no antipathy towards anyone. Our action affected Union members both plus and minus. Some who were active in the Union were benifitted and some who were not active were hurt. The effect is only on layoffs, nothing else. You have filed unfair labor charges. We think we are right and no doubt you think you are right. We'll let NLRB decide. Of course NLRB can't move until a General Counsel is approved by the Senate. This may be anytime, maybe next week, maybe longer.

LORING: Are we attempting to talk about our people who went on strike and then you are askeing us to agree to take punitive action against them?

BOARD'S DECISION AND ORDER

On June 17, 1955, Trial Examiner C. W. Whittemore issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter the Respondent filed exceptions to the Intermediate Report and a brief.[1] The

[1] The Respondent also filed a motion to incorporate into the record a posthearing contract made with one of the charging Unions, Carpenters. The General Counsel opposed the motion, on the ground that the alleged contract had no bearing on the issues. For the reasons set forth in *N. L. R. B.* v. *American National Insurance Company*, 343 U. S. 395, Footnote 4, and *Efco Manufacturing Company*, 108 NLRB 245, the motion is hereby denied.

Pipe Fitters also filed a brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in these cases, and hereby adopts the findings, conclusions and recommendations of the Trial Examiner, with the modifications noted below.

1. Because the facts in these cases satisfy us that the Respondent's motivation was discriminatory, we agree with the Trial Examiner that the Respondent violated Section 8(a)(3) and (1) of the Act with respect to the major issue, the Respondent's new super-seniority policy. It is highly significant that not until the strike was over, and all the strikers had been put back to work, did the Respondent *for the first time* decide to separate its employees into two seniority groups for layoff purposes, depending on whether or not they had returned to work before the end of the strike. The Respondent does not claim and there is no suggestion in the record that, as an economic measure to get employees to work during the strike, it had promised them super-seniority. In fact, it does not appear that the matter of relative seniority was ever mentioned to any employees before the end of the strike. Nevertheless, in the ensuing economic layoff, the Respondent in effect dismissed the complainants because of their protected activity in remaining on strike until its termination, while retaining an equal number of other employees with less seniority because they had not remained on strike. It was stipulated that the complainants would not have been selected for layoff under the seniority system established pursuant to the old contracts,—the only layoff system shown by the record to be in effect at the Respondent's plant prior to the advent of super-seniority.

Moreover, it is clear that even under the new system the complainants would not have been laid off if they too had returned to work before the Unions called the strike off.

On these facts we are convinced, as was the Trial Examiner, that the Respondent's change of seniority policy and its consequent dismissal of the complainants were in fact motivated, not by any legitimate economic interest of its own, but by a desire to punish the complainants for exercising the right guaranteed in Section 7 to engage in concerted activities, and a wish to reward the other employees for abandoning or not participating in the strike. Whether the Respondent's unlawful actions are regarded as a discouragement of membership in the Unions which the employees had selected as their collective bargaining representatives, and thus a violation of Section 8(a)(3) of the Act, or as an infringement of the more general statutory right to engage in concerted activities for mutual aid or protection and thus a violation of Section 8(a)(1), we find that the remedy hereinafter ordered is necessary to effectuate the policies of the Act.[2]

2. The unlawful motivation underlying the Respondent's proposal and imposition of the super-seniority clause during the very time it was ostensibly bargaining with the Unions, clearly reveals also its bad faith in the contract negotiations themselves. As we have already found, the Respondent's discriminatory seniority policy was a retaliatory measure to

[2] In defense of its action the Respondent cites the case of *N.L.R.B.* v. *Potlatch Forests, Inc.*, 189 F. 2d 82, where the Ninth Circuit Court denied enforcement of an 8(a)(3) finding on somewhat similar facts. We have carefully considered the *Potlatch* decision and are of the unanimous opinion that it is distinguishable on its facts from the instant case. In any event, Acting Chairman Rodgers and Member Murdock are constrained, with due deference to that Court, to disagree with the decision to the extent that it may conflict with the present finding.

penalize its employees for having exercised their statutory rights. Its argument now, that the simultaneous attempt to cement that policy in a final contract reflected only a good faith desire to perpetuate its concept of economic justice, is hardly persuasive. Rather, the Respondent's invocation of the new seniority policy in the contract negotiations, and its insistence even a year later—although all other issues had been settled between them—that the Unions either accept the new policy or forego any contract at all, establish that it did not deal with the Unions in good faith, as under the Statute it was required to do. Indeed, in the circumstances of this case, the Respondent's insistence upon its seniority-clause demand satisfies us that throughout the bargaining period involved, its conduct towards the Unions was colored by a bad faith resolve never to come to terms on a written agreement. Viewed against this background, the Respondent's other responses to the Unions' attempts to continue the bargaining conferences gain added significance as also revealing an outright decision to refuse to bargain. Thus, on March 15, 1954, it rejected the Unions' request for a collective bargaining meeting with a statement that the Unions' proposal should be made through the Federal Mediation and Conciliation Service; on April 15, or 16, 1954, it turned down another bargaining request with the advice that the Unions' proposal be submitted in writing; and finally, on April 27, 1954, it refused still another invitation to bargain by simply saying that an impasse had been reached and that further negotiations would be futile.[3] On the foregoing facts, and on the entire record, we find, as did the Trial

[3] We do not adopt the Trial Examiner's finding that the Respondent's failure to reply to a bargaining request of the Unions dated March 23 also constituted an unlawful refusal to bargain. Instead, we find, as also appears in the Intermediate Report, that the Respondent did reply to this request on March 30.

Examiner, that the Respondent refused to bargain with the Unions, and thereby violated Section 8(a)(5) and (1) of the Act.

Order

Upon the entire record in these cases, and pursuant to Section 10(c) of the National Labor Relations Act as amended, the National Labor Relations Board hereby orders that the Respondent, Olin Mathieson Chemical Corporation, Morgantown, West Virginia, and its officers, agents, successors and assigns:

1. Cease and desist from:

(a) Discouraging membership in or lawful activities on behalf of United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 152, AFL; United Brotherhood of Carpenters and Joiners of America, Local 1369, AFL; International Brotherhood of Electrical Workers, Local 425, AFL; or any other labor organization, by laying off any of its employees or otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment;

(b) Refusing to bargain collectively with any of the above-named labor organizations as the exclusive representative of all its employees in the respective unit herein found to be appropriate, with respect to rates of pay, wages, hours of work and other conditions of employment;

(c) In any other manner interfering with, restraining or coercing its employees in the exercise of the right to self-organization, to form or join labor organizations, to assist any of the above-named labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of col-

lective bargaining or other mutual aid or protection, and to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer to Robert Permar, Michael D. Eddy, Sr., Herman Morris, Francis Ruggerio, Wayne O. Mayfield, C. B. Smyth and Elwood Frum immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make them whole in the manner set forth in the section of the Intermediate Report entitled "The remedy";

(b) Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social-security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due under the terms of this Order;

(c) Rescind forthwith its discriminatory seniority policy announced on April 2, 1954, and effectuated on April 9, 1954, and restore all employees affected thereby to the seniority they would have enjoyed absent such discriminatory policy;

(d) Upon request, bargain collectively with each of the three above-named labor organizations as the exclusive representative of all the employees in the respective appropriate unit, and embody in a signed agreement any understanding reached;

(e) Post at its place of business in Morgantown, West

Virginia, copies of the notice attached to the Intermediate Report as an Appendix.[4] Copies of said notice, to be furnished by the Regional Director for the Sixth Region, shall, after being duly signed by the Respondent, be posted by it immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the said notices are not altered, defaced, or covered by any other material;

(f) Notify the Regional Director for the Sixth Region in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., October 18, 1955.

Philip Ray Rodgers, Acting Chairman
Abe Murdock, Member
Boyd Leedom, Member

[SEAL] NATIONAL LABOR RELATIONS BOARD

INTERMEDIATE REPORT

Statement of the Case

This proceeding, brought under Section 10(b) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act, was heard before the undersigned Trial Examiner at Morgantown, West Virginia, on May 16

[4] The notice shall be amended, however, by substituting for the words *"The Recommendations of a Trial Examiner"* in the caption thereof the words *"A Decision and Order."* In the event that this Order is enforced by a decree of the United States Court of Appeals, the notice shall be further amended by inserting before the words *"A Decision and Order"* the words *"A Decree of the United States Court of Appeals Enforcing an Order."*

and 17, 1955, pursuant to due notice to all parties. All parties were represented at the hearing, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence relevant and material to the issues, to argue orally upon the record, and to file briefs and proposed findings. General Counsel engaged in oral argument, the Respondent and the Pipe Fitters filed briefs.

The consolidated complaint, issued by the General Counsel of the National Labor Relations Board, the latter herein called the Board, alleges in substance that the above-named Respondents: (1) since on or about March 15, 1954, have refused to bargain in good faith with the above-named labor organizations as exclusive bargaining representatives of employees in certain appropriate units; (2) on April 2, 1954, discriminatorily altered its previous seniority policy to discourage membership in and activities on behalf of the said labor organizations; (3) on April 9, pursuant to said seniority policy discriminatorily laid off seven named employees and since then has refused to reinstate them; and (4) by such conduct has interfered with, restrained, and coerced employees in the exercise of rights guaranteed by Section 7 of the Act. In its duly filed answer the Respondent denied the commission of the alleged unfair labor practices.

Upon the entire record in the case and from his observation of the witnesses, the Trial Examiner makes the following:

Findings of Fact

I. The business of the Respondent

Olin Mathieson Chemical Corporation is a Virginia corporation engaged in the manufacture, sale, and distribution of ammonia, methyl alcohol, hexamine, and coke oven by-products in several States of the United States, having its

principal office in Baltimore, Maryland. On or about August 31, 1954, as the result of a corporate merger, the business of Mathieson Chemical Corporation and its Morgantown, West Virginia, plant, the only facility here involved, was continued under the name and style of Olin Mathieson Chemical Corporation. Mathieson Chemical was a Virginia corporation also, with a principal office in Baltimore, Maryland, and with plants and places of business in various States, including the Morgantown plant, where it was engaged in the production and sale of the above-described products.

During the 6-month period before August 31, 1954, the latter corporation made, sold, and shipped products valued at more than $1,000,000, of which amount more than 90 percent was shipped from Morgantown to points outside the State of West Virginia, and during the same period it purchased raw and other materials for use at its Morgantown plant valued at more than $1,000,000, of which about 30 percent came from points outside West Virginia. During the 6-month period between September 1954 and March 1955, Olin Mathieson made, sold and shipped products, and purchased raw materials in value and percentages in interstate commerce as above-described for Mathieson Chemical. The Respondent, the term hereinafter used to cover both corporations, stipulated at the hearing that it was engaged in commerce within the meaning of the Act, and that the Board has jurisdiction. It is so found.

III. THE UNFAIR LABOR PRACTICES

A. *The issues*

The major issues arise from the employer's decision, made during or soon after an economic strike, and as expressed by the testimony of Plant Manager M. B. Wright, to "re-

tain[ed] in the work group" with seniority over strikers all employees who did not strike or who returned to work during the strike. Specific acts claimed by General Counsel as violative of the Act were in implementation of this decision, and consist especially of: (1) a proposal made on April 2, 1954, and at all times thereafter insisted upon by the employer, that new contracts being negotiated must include a clause granting "super-seniority" to "any employee . . . who remained at or returned to work . . . during the period from February 25, 1954, to noon March 17, 1954"—the full term of the strike above referred to, and (2) the unilateral effectuation of that policy by actually laying off in accordance with its provisions certain employees who took part in the strike and failed to return until it was called off.

The complaint also claims, as additional items of refusal to bargain in good faith, that the Respondent engaged in "dilatory and delaying" negotiating tactics, and that it refused to discuss any issues between April 27, 1954, and March 3, 1955.

In the two succeeding sections will be set forth: (1) the relevant facts; and (2) the opposing contentions of the parties and the Trial Examiner's conclusions.

B. *The facts*

In 1952, following Board-conducted elections,[1] the three labor organizations here involved as charging parties were duly certified[2] as the exclusive bargaining representatives for certain groups of maintenance employees, as follows:

---

[1] The Board's Decisions, Orders, and Direction of Elections are set out in *Mathieson Chemical Corporation*, 100 NLRB 1028 and 101 NLRB 274.

[2] The certifications were stipulated by the parties in these proceedings.

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 152, A.F.L., (herein called the Pipe Fitters) for the units found appropriate by the Board:

> All pipefitters and helpers, excluding all other employees and supervisors. All welders and helpers, excluding all other employees and supervisors. All instrument repairmen and helpers, excluding all other employees and supervisors.

United Brotherhood of Carpenters and Joiners of America, Local 1369, A.F.L., (herein called the Carpenters) for the units found appropriate by the Board:

> All machinists, bench mechanics and helpers, excluding all other employees and supervisors. All millwrights and helpers, excluding all other employees and supervisors. All material fabricators and helpers, excluding all other employees and supervisors. All carpenters and helpers, excluding all other employees and supervisors.

International Brotherhood of Electrical Workers, Local 425, A.F.L., (herein called the Electrical Workers) for the unit found appropriate by the Board:

> All electricians and helpers, excluding all other employees and supervisors.

Following the certifications and negotiations, the Respondent entered into contracts with the three craft unions. All three contracts were to expire on February 10, 1954. In November 1953, the unions formally notified the employer, in accordance with terms of the existing agreements, that they desired to negotiate certain modifications. In December the employer acknowledged the request and, in its turn, expressed a desire to modify the contracts. Negotiations began on or about January 10, 1954. Thurman L. Radford,

business representative for the Pipe Fitters, served as spokesman for the craft unions.

Between January 10 and February 10 — when the contracts were to expire — about a dozen meetings were held. No full agreement was reached, although it appears that there was give and take on both sides. On February 10 representatives of the three unions and the employer sent a joint telegram to the Federal Mediation and Conciliation Service. Relevant excerpts from that wire are:

> The three unions jointly and the company have been attempting to renegotiate a contract expiring Feb. 10, 1954. A number of items have been agreed upon. A number of items including a wage increase, certain additional fringe benefits, and other proposed contractual clauses are in dispute.
>
> Both parties have reached a point where agreement appears impossible. A strike has been threatened any time after midnite Feb. 10, 1954. To avoid this it is imperative that as soon as possible, mediation and concilliation (sic) machinery be used in attempt to reconcile the differences.[3]

Mediation officials attended subsequent meetings. On February 17 the unions withdrew some of their proposals but, particularly as to wages, no agreement was reached. On February 24 the strike began. General Counsel concedes that the strike was economic in nature. On March 15, Plant Manager Wright sent Radford the following letter:

> You will be interested in knowing that on Wednesday, March 17, 1954, the Company will start to interview applicants for some of the jobs which were formerly

[3] The same wire also pointed out the "the 60 day notice required by law" had been filed by the unions.

filled by striking employees. This is information which I felt is in your interest to know.

Upon receipt of this letter Radford promptly telephoned to Thomas Kileen, the company attorney and negotiator, and asked for a negotiation meeting. Kileen replied that if Radford had any proposals to make he should make them through the Mediation Service. Radford thereupon called a Mediation official, reported Kileen's communication, and asked him to arrange a meeting. This official told Radford that A. A. Ahner, assistant to the president of the Respondent, would not be available for a meeting for a week. About the same time Radford was approached by James Coon, head of the local Chamber of Commerce and of a citizens' committee, who offered services to obtain peaceful labor relations at the Respondent's plant. Radford responded that the best thing he and his committee could do would be to arrange for the resumption of negotiations between the company and the unions. Later Coon communciated with Radford, and asked him, "If this citizens' committee would request you to return the striking employees to work at the plant, and negotiations would be resumed, and you return them to work under the terms of the old agreement, would you be agreeable?"

Radford agreed to this proposal, the strike was terminated, and the strikers returned to work at noon on March 17.

Whatever the basis for Coon's assurance to Radford that negotiations would resume,[4] none were immediately held. On March 23, Radford sent the following communication to the company:

[4] The complaint does not claim, nor is any finding made, that the "citizens' committee" was an instrument of the Respondent.

> On March 15, 1954, I telephoned the Mathieson Chemical Corporation and requested that negotiation between the Mathieson Chemical Corporation and the 3 AFL Unions, which represent certain of the Company's employees, be resumed. After conferring with Mr. A. S. Gilliam and Mr. Kileen, Mr. Kileen advised me, in part, to relay my proposal of resuming negotiations to Mr. William Rose of the Federal Mediation and Conciliation Service.
>
> On March 15, 1954 I contacted Mr. William Rose of the Federal Mediation and Conciliation Service, and advised him that it was the desire of the 3 AFL Unions to resume negotiations. I was informed by Mr. Rose that Mr. A. A. Ahner (a Company Representative) would not be available for a meeting with us during the week ending March 20, 1954.
>
> We hereby offer to meet and confer with the Representatives of the Company for the purpose of negotiating further on the unresolved issues and looking toward the fulfillment of our mutual obligation — the execution of a written agreement.

Although this letter was sent by registered mail, the Respondent did not reply to it. On March 29, Radford again wrote to the Respondent, pointing out that he had not received a reply to his previous letter, quoting from it, again seeking meetings, and concluding:

> I had hoped that directing the striking employees, of the 3 AFL Local Unions, to return to work, without any agreement whatsoever, would demonstrate to the Company and the Public our sincere desire to resolve the issues between the Company and our Unions.
>
> If the Mathieson Chemical Corporation continues to refuse to bargain in good faith by ignoring our repeated efforts to resolve our differences, the alternatives which we may pursue are very limited.

This letter was also published in the local newspaper.

On March 30, Assistant Manager A. S. Gilliam, of the Respondent, replied as follows:

> This is in reply to your letter of March 23, 1954. We will meet with you at a time mutually convenient to consider such matters as may be germane. I would suggest Friday, April 2, as a date for a meeting provided this is agreeable to you and your committee.

A meeting was held on April 2. At this meeting the employer offered to sign contracts with the three unions containing all provisions previously agreed to *except* that the seniority clauses must include the following addition:

> Anything in this Article IV on seniority to the contrary notwithstanding, employees in the journeymen classification and employees in the Helper Classification within a Work Group covered by this Contract who were not at work from February 25, 1954, until at or after noon on March 17, 1954, shall be laid off before any employee so classified in the same Work Group who remained at or returned to work or was hired during the period from February 25, 1954, to noon March 17, 1954, is laid off.

At the same time the Respondent informed the union representatives that it intended to lay off 94 employees in the maintenance department the following week, on April 9, and that the super-seniority policy contained in the above proposal would be used in selecting individuals for the layoff.

The unions flatly rejected the proposal and protested against the announced statement of layoff policy.

Despite the union's unequivocal rejection of this seniority policy, on April 9 the Respondent proceeded with the layoff

in accordance with it. The seven individuals here involved, who were laid off on April 9 out of their regular seniority order while others of lesser seniority were retained, are as follows:

Robert Permar	Francis Ruggerio
Michael D. Eddy, Sr.	Wayne O. Mayfield
Herman Morris	C. B. Smyth

Elwood Frum[5]

Employees retained, while the above-named were let go, were employees who had either returned to work during the strike or who did not strike.

None of the seven above-named employees has been recalled to work. (This finding is a reasonable inference drawn from the facts: (1) that the Respondent offered no evidence to refute the allegation of the complaint that since April 9, 1954, the said employees have been refused reinstatement, and (2) the testimony of Plant Manager Wright to the effect that up to the time of the hearing and since the layoff of April 9, 1954, with the exception of recalling two welders unidentified and apparently not here involved there has been no change in the size of the maintenance groups employed.)

On April 15 or 16, Radford telephoned to Kileen, seeking a negotiating meeting, but was informed that the company did not wish to meet with the unions, and that if he had any proposals to make they should be submitted in writing.

On April 20, Radford wrote to the Respondent, stating in part:

---

[5] It was stipulated at the hearing by the parties that the above-identified employees were thus laid off. Since no evidence was offered, and the Respondent does not claim, that any *new* employees were hired as replacements during the strike, that issue clearly is not before the Trial Examiner, and will not be discussed herein.

> On April 16, 1954, I telephoned the Mathieson Chemical Corporation and requested of Mr. T. E. Kileen a negotiation session between the Mathieson Chemical Corporation and the 3 AFL Unions which represent certain of the Company's employees.
>
> Mr. Kileen stated that the Company did not wish to meet and suggested that we submit our proposals in writing. Since, apparently, we have no other alternative, we are submitting, in part, our proposals. In doing so, we would like to point out that this is a very impractical method of resolving the many issues that remain unresolved.

The letter then outlined certain union proposals, including a reduced wage demand, and repeated its request for a meeting with employer representatives.

On April 27, Wright replied as follows — the text of his letter being quoted in full:

> This is in reply to your letter of April 20, 1954.
>
> As you know, we negotiated for several months regarding the renewal of the three A.F.L. contracts which expired simultaneously on February 10, 1954.
>
> The only issue was a wage increase which we opposed. Your group went out on strike to enforce your demand for a wage increase.
>
> We told you repeatedly in meetings before and during the strike, and in one meeting held after the strike, that there could be no wage increase granted this year, giving you our reasons therefor in detail many times.
>
> As a result of the strike, certain new issues arose.
>
> At the meeting after the strike on April 2, 1954, we stated the conditions under which we would sign an agreement and you said those conditions were totally unacceptable to you and you could never agree to them.

> We stated that our offer would remain open for five days.
>
> We next heard from you on April 15, asking for a meeting to discuss "the unresolved issues." We told you that we do not propose to sit in a series of futile meetings repeating our respective position and asked that you submit any new proposal in writing.
>
> You have now done so. You still propose a wage increase, although we have told you in many meetings over a period of several months that we could not grant a wage increase. You totally ignore the new issues which arose as a result of the strike. Your position is utterly unrealistic. It illustrates the futility of further meetings on questions regarding which we are apparently hopelessly in opposition.
>
> We are forced to reject the proposals contained in your letter of April 20. It is unnecessary to cite reasons which have been given to you so many times before.
>
> We see nothing to be gained in a meeting such as you propose. You know our position too well to waste your time and ours in futile discussions of previously rejected proposals.

Radford took this letter as a refusal to meet, and shortly thereafter, on June 7, all three A.F.L. unions filed charges against the Respondent with the Board, claiming violations of the Act by refusing to bargain and by discriminating against strikers.

After thus replying, on April 27, 1954, to the unions' request to meet, the Respondent did not communicate with Radford again until February 12, 1955, when Wright wrote to him as follows:

> We have not heard from you since we wrote you April 27, 1954. We now reinstate the proposal made by us in that letter and the proposal we made in our meeting

> with you on April 2, 1954, ammended (sic), however, as follows: We propose to increase the straight time hourly wage rates for any employees which may represent in the amount of 3¢ per hour effective February 13, 1955; provided we receive your concurrence. We will be glad to receive your concurrence in writing and if you prefer to confer with us, you may do so.

On February 15, Radford replied, pointing out that the company, in its letter of April 27, 1954, above quoted, had refused to meet as requested, and that a number of unresolved issues had then been pending, and agreeing to meet on any day set by the company.

The parties met on March 3, 1955. Representatives of the three unions, including Radford, were present. No witness at the hearing testified fully as to his recollection of all discussions at this meeting. Copious notes taken by Industrial Relations Manager W. T. Webb were received in evidence. It appears unnecessary here to attempt complete reconstruction of this negotiating meeting, since there is no apparent dispute as to understandings reached except as to a single matter — that of actual inclusion in written agreements of the new seniority policy unilaterally put into effect by the company on April 2, 1954. In substance, the testimony and Webb's notes show that agreement was reached, or discussions dropped, on all points except that of seniority. As to the "super-seniority" amendment, quoted heretofore, it appears from cross-examination of Radford by counsel for the Respondent, that the latter sought to establish that the unions, on March 3, actually agreed to permit inclusion of the disputed clause in written agreements. Not only did Radford stoutly and credibly deny having made such an agreement, but the apparent claim is not supported by testimony on the part of Respondent's witnesses, nor by Webb's

notes. In any event, as the exchange of later correspondence shows — which is quoted below — the unions made it unequivocally plain to the company, *before* the written agreements were submitted for signature, that it would not accept a contract containing a clause which it was claiming, before the Board, to be illegal.

On March 14, Radford wrote to the Respondent as follows:

> In accordance with the discussions that Representatives of United Association Local Union No. 152, I.B.E.W. Local Union No. 425, and Carpenters Local Union No. 1369 had with your Representatives on March 3, 1955, we herewith accept the entire proposals of hour Company, unconditionally, which are as follows:
>
> 1. Increase of three cents ($.03) per hour for all employees represented by the above Local Unions.
> 2. All of the proposals which were tentatively agreed upon prior to the strike.
> 3. A One-Year Agreement.
> 4. Seniority Provision proposed by you on April 2, 1954, and against which an Unfair Labor Practice Charge is now pending before the National Labor Relations Board, will be held in abeyance until the Board renders its decision.
>
>   If the Board determines that your proposed provision is legal, then the Contract will be amended to include it.
>
>   If the Board determines that the provision is illegal then the Seniority Provision of the last Contract shall be included in the present Contract by amendment.

> If you will draft contracts and forward them to us, we will execute them.

Despite Radford's above-quoted written statement of his understanding that the controversial seniority clause was to be "held in abeyance until the Board renders its decision," Wright on March 21 sent to the unions written agreements for signature which contained the seniority clause, and accompanied the contracts with a covering letter which said, in part:

> In accordance with your letter of March 14, in which you advise that United Association Local Union No. 152, IBEW Local Union No. 425, and Carpenters Local Union No. 1369, have unconditionally accepted the entire proposals made on March 3, 1955, by the company to the representatives of these three unions in a negotiating session held at Morgantown, we are sending you enclosed herewith copies of agreements between the company and each of the unions for execution by the unions and return to us.

Wright in the same letter called particular attention to the disputed seniority clause. In view of the apparent position taken by counsel for the Respondent during the hearing, as to agreement reached on March 3, it is noteworthy that Wright makes no such claim in his letter. As to the seniority clause he says: "Pending final adjudication of the strike-seniority issue raised by the three local unions, we, on March 3, 1955, *proposed* that the strike-seniority provision above referred to would remain unchanged, but that if final adjudication of the strike issue were adverse to the company, the second paragraph of Article IV, Section 5(a) would, in accordance with such decision, be deleted from the contract." (Italics added.)

On March 30, 1955, Attorney Thomas X. Dunn for the Pipe Fitters, who had been present at the March 3 meeting, replied to Wright's above-quoted letter as follows:

> As counsel for the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and Local Union 152, it was not my understanding that the strike seniority provision (Art. IV, Section 5-A) would be included in a new agreement, pending a determination of the legality of that provision by the National Labor Relations Board. The proposal was that if all other conditions were agreed upon, then the status of the strike seniority would be left for the Board.
>
> For these locals to agree to the insertion of the strike seniority provision in their contract at that time would obviously be placing them in the position of expressly agreeing that you could continue to commit an unfair labor practice while we are claiming the opposite before the Board. They, in effect, would be consenting to your illegal conduct and the question of waiver and estoppel could become an issue in the case where such does not exist at this time.
>
> There is no purpose, legally or factually, for your insistence that this provision remain in the contract, and when the writer appeared at the March 3, 1955 conference, he did so hoping that the parties, in good faith, could come to an understanding on all differences except the matter pending before the Board.
>
> It is apparent that you do not wish to deal with these local unions and particularly it is your wish that they not represent any men in your plant. We consider your conduct in refusing to execute a contract as further evidence of bad faith and refusal to bargain.
>
> Local 152 will not waive any of its rights in the case before the Board by executing an agreement with the strike seniority clause contained in it.

In the last piece of correspondence exchanged before the hearing to be introduced into evidence, Wright replied to Dunn's letter as follows, on April 7, 1955:

> The proposal of the Company made to the three unions March 3, 1955, was carefully explained, and I believe you will recall having clarified the strike-seniority proposal for Mr. Radford during the meeting. In order that there would be no misunderstanding, we offered to furnish to the unions copies of all revised articles, and did so with certain exceptions at the meeting on March 3. The other revisions including the one on strike-seniority were went to Mr. Radford following the meeting with our letter of March 3.
>
> Mr. Radford advised us by letter dated March 14 that the three unions "unconditionally" accepted the proposal made by the Company, and we forwarded to Mr. Radford 6 copies of each of the three contracts for execution as required by him. The Company, as we indicated in our letter of March 21, is ready and willing to execute the contracts sent the unions embodying the agreements reached by the parties' good faith in collective bargaining.
>
> We had hoped to expedite contract execution by sending them all to Mr. Radford as he suggested, and we advised him that we would execute them for the Company upon their return, signed, by us.
>
> We look forward to consumating the agreement reached by the Company and the three unions through execution of the contracts sent Mr. Radford which embody that agreement.

Before turning to resolution of the matters in legal dispute, it would be appropriate to resolve the apparent controversy as to facts, particularly as to whether or not there was: (1) agreement by the Union, on March 3 or there-

after, to permit inclusion of the company's seniority clause in the contract, or (2) agreement by the company to exclude it, as alleged by an amendment to the complaint at the hearing.

The Trial Examiner finds that *no* agreement was reached on this point. Careful reading of Webb's copious notes, which are in evidence, reveals only that the company attorney insisted that the clause be included and that Radford as stoutly objected. The testimony of Gilliam, a company representative present, further supports the finding that no agreement was reached, as shown by the following excerpts:

> (Gilliam) . . . Mr. Dunn expressed to Mr. Radford at that time thinks Mr. Stull has made it clear, amounts to having it in the contract, or leaving it up to the Board; then the Board will determine.
>
> Q. Did that satisfy Mr. Radford, as you recall?
> A. It didn't appear to. . . .
>
> * * *
>
> A. The last reference to seniority, as I recall it — and I am refreshing my mind from my notes — was near the end of the meeting when Mr. Dunn inquired about the seniority clause, and suggested that if the locals here, if they withdrew the no-strike issue, would it then be enough to change the company's mind on seniority by withdrawing our position on this and put the old seniority back, at which Mr. Stull replied, "No, we aren't withdrawing anything. . . ."

Nor do Wright's two letters, of March 21 and April 7, quoted above, warrant belief that he considered that any such agreement to include the clause had been reached on March 3. In both letters he refers only to what he claims was unconditional acceptance on *March 14*, in Radford's

letter of that date, of the proposals made by the company on March 3. Radford's letter is not ambiguous. Its language plainly transmits the message that the Unions were unconditionally accepting the proposal that the disputed clause be *kept out* of any signed agreement unless and until it should be found legal by the Board. For whatever reason, Wright chose to lift the words "unconditional" and "accept" from their context.

Whether Radford's recollection was correct or not, to the effect that on March 3 the company agreed to hold the seniority clause in abeyance, it is clear that no agreement was ever reached by the parties to include it in the contract until its legality had been passed upon by the Board. On the other hand, Radford's testimony as to his recollection lacks support in that of employee Heldreth, also present at the March 3 meeting. The Trial Examiner believes the evidence insufficient to establish clearly that on that date the company agreed to hold the clause in abeyance.

C. *Conclusions*

No evidence to the contrary having been offered by the Respondent, and all testimony on the point indicating that at all times material the parties have been negotiating on that basis, it is concluded and found that: (1) the units described in Section III B above are appropriate for the purposes of collective bargaining within the meaning of Section 9 of the Act; (2) since October 6 and December 9, 1952, the respective labor organizations involved herein have been and now are the exclusive bargaining representatives of the employees in said units; and (3) since on or before March 15, 1954, and at all times thereafter, said labor organizations have sought to bargain collectively with the Respondent.

As noted heretofore, the major issue for determination here is whether or not, under the Act, the Respondent's imposition and effectuation of the new seniority policy were unfair labor practices.

It has been found above that on April 2, 1954, during negotiations, the employer announced the new policy and proposed that the unions agree to it, and that on April 9 despite the union's flat objections the employer laid off employees in accordance with it. Just what is the nature of that policy? It gave returning strikers employment rights of value greater than they had earned by mere length of service with the company. Wright's testimony makes it plain that it was given, as a reward, to employees abandoning the strike or not going on strike. He said: ". . . we owed these men an obligation for as much job security as possible." There being no evidence to the contrary, it is reasonably inferred that the employer assumed this "obligation" voluntarily, without request from anyone, and without necessity. Indeed, in his brief counsel for the Respondent says: "the necessity for protecting Company's business was not mentioned." No claim was advanced that the "obligation" was assumed in order to get replacements during the strike,—*new* employees in contradistinction to employees on strike. It was a gift, in short, to employees who had abandoned their right to engage in protected concerted activities. But it was not a gift, or reward, coming out of the employer's pocket. Until a layoff occurred, it could be of value only as psychological "job security"—mental assurance that the recipient would be among the last to go, no matter how long he had worked for the company. When the "obligation" was satisfied and the so-called debt paid, its substance came out of the very employment tenure of fellow-employees, as actually happened on April 9. Men with longer

service were let go. Thus the discrimination, both in latent policy and overt application, was real and not incidental. The returning striker could not benefit, in terms of employment, except at the expense of the striker who chose to exercise his legal right. In short, the nature of the policy was such that the reward could not be paid one except by simultaneously punishing another. The same coin, with two sides, taken from one employee's pocket and given to another.

Had the Respondent merely *offered* such an inducement to its employees while they were on strike, its act would have been found violative of the Act by the Board, in accordance with its decision in *Dinion Coil Co., Inc.* (110 NLRB No. 27). There the Board found that during a similar economic strike occurring during negotiations the employer "bypassed the Union, and tended to undermine its prestige as the employees' exclusive representative" by threatening to withdraw, among other things, "seniority credits."

In his able brief, counsel for the Respondent appears to rely mainly upon the contention that "There is here no evidence of discrimination nor of any purpose or attempt to discourage union membership," and upon the decision of the U. S. Court of Appeals, Ninth Circuit, in *Potlatch Forests, Inc.* (189 F. 2d 82) which set aside 87 NLRB 1193, quoting from that court decision:

> So far as Sec. 8(a)(3) is concerned, Potlatch may adopt any rule of seniority it desires—whether or not that rule violates an existing agreement—so long as that rule does not discourage union membership by discrimination.

Counsel failed to quote the following, however, from the same decision:

> In the instant case, therefore, the "discrimination" between replacements and strikers is not an unfair labor practice despite a tendency to discourage union activities, because the benefit conferred upon the replacements is a benefit reasonably appropriate for the employer to confer in attempting "to protect and continue his business by supplying places left vacant by strikers."

As noted heretofore, the Respondent makes no claim that the reward to returning strikers in this case was to "protect or continue" the business. It appears to the Trial Examiner that on this point, as well as others pointed out by General Counsel in his argument, and by counsel for the Pipe Fitters in his brief, this case is distinguishable from Potlatch.

It has been found that the new policy was discriminatory in favor of employees leaving the strike and against those who remained on strike until called off. It has also been found, on the basis of Wright's testimony as well as the plain facts of the labor dispute, that the motive for inaugurating and applying the new policy was to reward employees who abandoned the strike and to punish those who had remained on strike. The Board and the courts have long held at it is common knowledge that a strike called by the bargaining representative of employees is (barring certain types of strikes not involved here) "concerted activities" within the meaning of Section 7 of the Act and an activity within the scope of participating "membership in any labor organization." The strike which is here involved was a "union activity" which members were called upon to perform in an effort to pressure the employer to yield to the economic demands of the employees' legal bargaining representative. It reasonably follows that any discrimination in favor of employees who ceased this union activity and against those who continued it could have had no other

effect than to discourage union membership to the extent that it warned all employees, upon penalty of like treatment, that they must not in the future exercise the strike privilege of such membership. That no member of management admitted as a witness that the Respondent acted with the intent of discouraging union membership is not a critical flaw in General Counsel's proof. The Supreme Court of the United States said in *Radio Officers' Union, et al.*, (347 U. S. 17); (33 LRRM at p. 2428).

> Both the Board and the courts have recognized that proof of certain types of discrimination satisfies the intent requirement. This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common law rule that a man is held to intend the foreseeable consequences of his conduct.

The Trial Examiner concludes and finds that both the announcement of the unilateral policy, and its application, were discriminatory and designed to discourage membership in the unions involved, and thus were violative of Section 8(a)(3) of the Act.

It appears unnecessary here to pass upon a question which the parties, during negotiations, expressed some wish to have the Board decide—whether, *per se*, the discriminatory seniority policy was illegal. In passing, however, it may be well to draw the attention of both the Board and the parties to *Minneapolis Star and Tribune Company* (109 NLRB No. 109) where the Board majority found that both the employer and the union violated the Act, not only by exercising, but also by entering into a contract which permitted the *union* to put at the bottom of the usual seniority list an employee who declined to *participate* in strike activities.

Since discrimination is the act to be guarded against, and it makes little difference to the employee whether it is the union or the employer who initiates the discrimination against him, it would appear that the rule should likewise frown upon any agreement permitting an *employer* to discriminate against employees who *participate* in a strike.

It has been found above that, pursuant to the new seniority policy, the following individuals were laid off on April 9, 1954, while others of lesser seniority were retained:

Robert Permar	Francis Ruggerio
Michael D. Eddy, Sr.	Wayne O. Mayfield
Herman Morris	C. B. Smyth

Elwood Frum

Having concluded that the policy invoked was violative of the Act, the Trial Examiner concludes and finds that the individuals named above were laid off discriminatorily, in order to discourage union membership and activity, in violation of Section 8(a)(3) of the Act.

Turning now to the no less important question as to whether the unilateral application by the Respondent of its new seniority policy and its insistence that it be included in any signed agreement constituted a refusal to bargain, within the meaning of Section 8(a)(5) of the Act. In his brief, counsel for the Respondent contends: ". . . refusal to bargain cannot be sustained on the basis of one parties' (sic) insistence on a proposal any more than upon the other parties' rejection of it." He cites no authority for such a broad contention and the Trial Examiner know of none. The Board has repeatedly found that a very real distinction exists between merely proposing, or urging, a point being negotiated, and insisting upon it to the point of forcing the other party to accept or forego any contract. (For cases in which proposals fell short of ultimate insistence, see *Solar*

Aircraft Company, 109 NLRB No. 22, and *United States Gypsum Company*, 109 NLRB No. 159. For cases in which proposals became "a condition precedent to an agreement," see *I.B.S. Manufacturing Company*, 96 NLRB at 1269, *Pecheur Lozenge Co., Inc.*, 98 NLRB at 497, and *Stylecraft Furniture Co.*, 111 NLRB No. 151.)

Since it has been found as a fact, in the preceding section, that the Respondent has made acceptance of its proposal "a condition precedent to an agreement," from April 2, 1954, to the time of the hearing, the Trial Examiner concludes and finds that this conduct was a clear refusal to bargain in violation of Section 8(a)(5) of the Act. It follows and is likewise found that the Respondent violated the same section on April 9, 1954, when it unilaterally put into effect, during the course of negotiations and over the unions' objections, a policy which it could not legally insist that the unions agree to include in a contract. This is so, whether or not the policy was of itself discriminatory and illegal.

As to remaining issues raised by the complaint, General Counsel urges that the Respondent failed to bargain in good faith by following conduct, found above to have occurred: (1) Kileen's insistence on March 15, 1954, that Radford make any further negotiating proposals through the Federal Mediation Service; (2) the company's failure to reply to Radford's letter of March 23, which again requested a meeting; (3) Kileen's rejection on April 16 of Radford's telephonic request to meet and his instruction that any proposals be submitted in writing; and (4) the company's letter of April 27, which effectively cut off further negotiations for nearly a year. The Trial Examiner concludes that General Counsel's contentions have merit. As to points (1), (2) and (3), it would appear that ample support of General Counsel's position is to be found in the following quotation

from the Fifth Circuit, U. S. Court of Appeals, decision in *U. S. Cold Storage Corp.*, 32 LRRM at 2027, and cases therein cited:

> Section 8(d) of the Act defines "collective bargaining" as the "obligation of the employer and the representatives of the employees to meet at reasonable times and confer in good faith." This statutory obligation is not satisfied by merely inviting the union to submit any proposition they have to make in writing where either party seeks a personal conference.

And in a more recent case, *Beasley Mills* (111 NLRB No. 137), the Board has found similarly dilatory and evasive tactics to be violative of Section 8(a)(5) of the Act.

And as to point (4), the language of Wright's letter of April 27, 1954, could hardly have been reasonably interpreted by Radford as other than a clear refusal to meet and negotiate. It has been quoted in full above. In it Wright acknowledges the request to meet, rejects the written proposals flatly, and closes with the firm declaration that management sees "nothing to be gained in a meeting." It was hardly incumbent upon the unions to make further efforts to meet, having been twice, within a period of 2 weeks, refused an audience. It would appear that they pursued the appropriate course provided by the Act, and filed charges with the Board. This plain refusal on the part of the Respondent to carry out its obligations as defined by the Act was in violation of Section 8(a)(5) of the Act.

In conclusion, it is further found that by the aforesaid conduct by the Respondent in violation of Section 8(a)(3) and (5) of the Act, it interfered with, restrained, and coerced employees in the exercise of rights guaranteed by Section 7 of the Act, and thereby violated Section 8(a)(1) of the Act.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent, set forth in Section III, above, occurring in connection with the operations of the Respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the Respondent has engaged in certain unfair labor practices affecting commerce, the Trial Examiner will recommend that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act.

It has been found that the Respondent discriminatorily laid off seven employees on April 9, 1954, and has denied reinstatement to them, and that such discrimination has been pursuant to its discriminatory seniority policy put into effect on the same date. It will be recommended that the Respondent forthwith rescind said seniority policy and unconditionally offer the said seven employees immediate and full reinstatement to their former or substantially equivalent positions without prejudice to seniority and other rights and privileges. It will also be recommended that the Respondent make whole the same employees for any loss of pay they may have suffered by reason of the discrimination against them, by payment to each of them of a sum of money equal to the amount he would normally have earned from April 9, 1954, to the date of offer of reinstatement, less his net earnings during that period. The amount of back pay due shall be computed according to Board policy set forth in *F. W.*

Woolworth Company, 90 NLRB 289. Payroll and other records in possession of the Respondent are to be made available to the Board, or its agents, to assist in such computation.

It will be further recommended that the Respondent bargain in good faith with the unions here involved, upon request, and that it not insist, as a condition of executing any agreements, upon the discriminatory seniority policy herein described.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the Trial Examiner makes the following:

Conclusions of Law

1. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 152, A.F.L.; United Brotherhood of Carpenters and Joiners of America, Local 1369, A.F.L.; and International Brotherhood of Electrical Workers, Local 425, A.F.L., are labor organizations within the meaning of Section 2(5) of the Act.

2. Since October 6, 1952, said labor organization of Pipe Fitters has been and now is the exclusive representative of all employees in the following appropriate units for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:

> All pipe fitters and helpers, excluding all other employees and supervisors. All welders and helpers, excluding all other employees and supervisors. All instrument repairmen and helpers, excluding all other employees and supervisors.

3. Since October 6, 1952, said labor organization of Carpenters has been and now is the exclusive representative of all employees in the following appropriate units for the pur-

pose of collective bargaining within the meaning of Section 9(a) of the Act:

> All machinists, bench mechanics and helpers, excluding all other employees and supervisors. All millwrights and helpers, excluding all other employees and supervisors.

And since December 9, 1952, said labor organization has similarly been the exclusive bargaining representative of all employees in the following units:

> All material fabricators and helpers, excluding all other employees and supervisors. All carpenters and helpers, excluding all other employees and supervisors.

4. Since October 6, 1952, said labor organization of Electrical Workers has been and now is the exclusive representative of all employees in the following appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:

> All electricians and helpers, excluding all other employees and supervisors.

5. By refusing on and after March 16, 1954, to bargain collectively with the aforesaid labor organizations as the exclusive representative of the employees in the appropriate units the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By discriminating in regard to the hire and tenure of employment, and conditions of employment, of employees Robert Permar, Michael D. Eddy, Sr., Herman Morris, Francis Ruggerio, Wayne O. Mayfield, C. B. Smyth, and Edwood Frum, thereby discouraging membership in the aforesaid labor organizations, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

7. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in the case, the Trial Examiner recommends that Olin Mathieson Chemical Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in or activities on behalf of United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 152, A.F.L., United Brotherhood of Carpenters and Joiners of America, Local 1369, A.F.L., and International Brotherhood of Electrical Workers, Local 425, A.F.L., or in any other labor organization, by discriminatorily laying off or denying reinstatement, or by discriminating in any other manner in regard to hire and tenure of employment or any terms or conditions of employment;

(b) Refusing to bargain collectively with the above-named labor organizations as the exclusive representative of all employees in the respective units herein found to be appropriate, with respect to rates of pay, wages, hours of work, and other conditions of employment;

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form or join labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action, which the Trial Examiner finds will effectuate the policies of the Act:

(a) Offer to Robert Permar, Michael D. Eddy, Sr., Herman Morris, Francis Ruggerio, Wayne O. Mayfield, C. B. Smyth, and Elwood Frum immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

(b) Make whole the aforesaid employees for any loss of pay they may have suffered by reason of the Respondent's discrimination against them, in the manner set forth above in the section entitled "The remedy";

(c) Upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all records necessary to determine the amounts of back pay due;

(d) Rescind forthwith its discriminatory seniority policy announced on April 2, 1954, and effectuated on April 9, 1954, and restore all employees affected thereby to the seniority they would have enjoyed absent such discriminatory policy;

(e) Upon request, bargain collectively in good faith with the three above-named labor organizations, as the exclusive representatives of employees in the units as above described, with respect to their rates of pay, wages, hours of work, and other conditions of employment, and embody in signed agreements any understanding reached;

(f) Post at its place of business in Morgantown, West Virginia, copies of the notice attached hereto as Appendix. Copies of the notice, to be furnished by the Regional Director for the Sixth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for a period of sixty (60) days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for the Sixth Region, in writing, within twenty (20) days from the date of the service of this Intermediate Report, what steps the Respondent has taken to comply therewith.

It is further recommended that, unless within twenty (20) days from the date of the service of this Intermediate Report the Respondent notifies said Regional Director that it will comply with the foregoing recommendations, the Board issue an order requiring the respondent to take the aforesaid action.

Dated at Washington, D. C., this ..... day of June 1955.

(s) C. W. WHITTEMORE
C. W. WHITTEMORE
Trial Examiner

Appendix

NOTICE TO ALL EMPLOYEES

PURSUANT TO THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not discourage membership in *United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 152, A. F. L., United Brotherhood of Carpenters and Joiners of America, Local 1369, A. F. L., International Brotherhood of Electrical Workers, Local 425, A. F. L.*, or in any other labor organization of our employees, by discharging, laying off, or refusing to reinstate any of our employees or by discriminating in any other manner in regard to their hire and tenure of employment or any term or condition of employment.

We will not insist, as a condition of executing any agreements with the above-named labor organizations that they include provisions granting discriminatory seniority privileges to employees who did not exercise, or ceased exercising, their right under the Act to engage in concerted activities, during the February-March 1954, strike.

We will not, in any manner, interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist the above-named or any other labor organization, to bargain collectively

through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

We will bargain collectively, upon request, with the three above-named labor organizations, as the exclusive representatives of employees in the respective appropriate units set forth below, with respect to grievances, labor disputes, wages, rates of pay, hours of employment and other conditions of employment, and if an understanding is reached, embody such understanding in signed agreements.

> All pipe fitters and helpers, excluding all other employees and supervisors. All welders and helpers, excluding all other employees and supervisors. All instrument repairmen and helpers, excluding all other employees and supervisors.
>
> All machinists, bench mechanics and helpers, excluding all other employees and supervisors. All millwrights and helpers, excluding all other employees and supervisors. All material fabricators and helpers, excluding all other employees and supervisors. All carpenters and helpers, excluding all other employees and supervisors.
>
> All electricians and helpers, excluding all other employees and supervisors.

We will offer the following named employees immediate and full reinstatement to their former or substantially equivalent positions without prejudice to any sen-

iority or other rights and privileges previously enjoyed, and make them whole for any loss of pay suffered as a result of the discrimination against them:

Robert Permar	Francis Ruggerio
Michael D. Eddy, Sr.	Wayne O. Mayfield
Herman Morris	C. B. Smyth

Elwood Frum

We will rescind our policy of depriving participants in the strike of February-March 1954, of the seniority which they would have had but for such policy.

All our employees are free to become or remain members of the above-named or any other labor organization. We will not discriminate in regard to hire or tenure of employment against any employees because of membership in or activity on behalf of any such labor organization.

OLIN MATHIESON CHEMICAL CORPORATION
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

MOTION OF RESPONDENT
(Filed July 18, 1955)

Comes now the Respondent and respectfully moves that, the Board accept into evidence as a part of the record in the above captioned case the executed contract currently in effect between the Respondent and the United Brotherhood of Carpenters and Joiners of America, Local 1369, A.F.L., one of the charging unions, along with the supplemental

agreement between the parties executed concurrently therewith and attached thereto, neither of which were available at the time the hearing in this matter was held in Morgantown, West Virginia, * * *

In support of this motion, Respondent submits that subsequent to the close of the hearing in this matter held in Morgantown, West Virginia on May 16 and 17, 1955, the Respondent continued negotiations with the United Brotherhood of Carpenters and Joiners of America, Local 1369, A.F.L. with respect to the matters still at issue between the parties at the time of the hearing at the request of the Carpenters Union (the only one of the charging unions which has requested further meetings following the collective bargaining session of March 3, 1955) and on June 22, 1955 entered into and executed a written contract with the Carpenters Union embodying all of the proposals made by the Respondent to all three of the charging unions at the March 3, 1955 meeting (as clarified and explained in Respondent's letters of March 21, 1955 to Radford (G. C. Ex. 25) and Respondent's letter of April 7, 1955 to Counsel Dunn (G. C. Ex. 27)) such contract being the same contract with the exception of:

1) Dates

2) The addition under Article XVIII of the following paragraph:

> Either party to this Agreement shall have the right to reopen for negotiation on the subject of wage rates only, all other items specifically excluded, on February 13, 1956, providing that the party so desiring to reopen notifies the other in writing by registered mail at least sixty (60) days in advance of such reopening date.

which was sent to the unions with Respondent's letter of March 21, 1955 (G. C. Ex. 25) and which proposed agree-

ment was introduced in evidence by General Counsel as General Counsel's Exhibit 24(b). Attached to the executed contract is a supplemental agreement dated June 22, 1955 relating to the seniority clause which reads as follows:

SUPPLEMENTAL AGREEMENT

The Olin Mathieson Chemical Corporation for its Morgantown, West Virginia, operations and the United Brotherhood of Carpenters and Joiners of America, Local 1369, AFL, have, concurrently herewith, executed a labor contract effective the 22 day of June, 1955, with the understanding and mutual agreement that, pending final adjudication of the strike-seniority issue with respect to which charges have been filed with and hearings held by the National Labor Relations Board, the labor contract effective the 22 day of June, 1955, reflects the complete agreement between the parties, but, in the event that final adjudication of the strike-seniority issue is adverse to the Company, then the second paragraph of Article IV, Section 5(a) will, in accordance with such decision and with the provisions of Article XVII of the contract, be deleted and the contract in all other respects shall remain in full force and effect for the duration thereof.

Executed this 22 day of June, 1955.

OLIN MATHIESON CHEMICAL CORPORATION
Morgantown, West Virginia
by (s) M. B. Wright
Manager

LOCAL UNION NO. 1369 OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A.F.L.
By (s) C. L. Canterbury
President
By (s) Carl B. Mercer
By (s) James E. Williams

The charging union executing this Agreement represented Michael D. Eddy, Wayne O. Mayfield, Herman Morris and C. V. Smith, four of the individuals named in the complaint, none of whom testified for the Board or the charging unions at the hearing.

INDEX

Page

Trial Examiner, C. W. Wittemore, Esq.

Appearances: For the General Counsel, Joseph C. Thackery, Esq., Attorney, 2107 Clark Building, Pittsburg, Pa.; C. W. Ahner, Esq., Ambassador Bldg., St. Louis, Mo., on behalf of Mathieson Chemical Corporation, the Respondent; Francis X. Ward, Esq., General Counsel, 222 East Michigan Street, Indianapolis, Ind., on behalf of United Brotherhood of Carpenters and Joiners of America, Local 1369, AFL, Charging Union; Mr. Thermon L. Radford, 231 Chestnut Street, Morgantown, W. Va., on behalf of United Assn. of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 152, AFL, and International Brotherhood of Electrical Workers, Local 425, AFL, Charging Union 1-2

Proceedings:

Witnesses on behalf of the General Counsel:

Thurmon L. Radford

Direct Examination 2

Cross Examination 4

Willis Heldreth

Direct Examination 7

A. S. Gilliam

Direct Examination 9

Cross-Examination 9

M. Birney Wright

Direct Examination 9

Cross-Examination 10

General Counsel's Exhibit No. 4-A

Agreement between Mathieson Chem. Corp., Morgantown, W. Va. and United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada..... 11

Article IV—Seniority..... 11

General Counsel's Exhibit No. 16..... 15

General Counsel's Exhibit No. 20..... 16

General Counsel's Exhibit No. 24-a..... 17

Respondent's Exhibit No. 4..... 22

Respondent's Exception No. 7..... 23

[1] BEFORE THE NATIONAL LABOR RELATIONS BOARD

SIXTH REGION

Case Nos. 6-CA-835, 6-CA-836, 6-CA-837

Mathieson Chemical Corporation and/or
Olin Mathieson Chemical Corporation,

and

United Association of Journeymen and Apprentices
of the Plumbing and Pipe Fitting Industry of the
United States and Canada, Local 152, AFL

and

United Brotherhood of Carpenters and
Joiners of America, Local 1369, AFL,

and

International Brotherhood of Electrical Workers,
Local 425, AFL.

Council Chambers, City Hall
Morgantown, West Virginia
Monday, May 16, 1955

Pursuant to notice, the above entitled matter came on for hearing at 9:30 a. m.

Before:

C. W. Whittemore, Esq., Trial Examiner.

Appearances:

Joseph C. Thackery, Esq., Attorney, 2107 Clark Building, Pittsburgh 22, Pennsylvania, appearing on behalf of the General Counsel.

[1(a)] *H. Webster Stull, Esq.*, 1501 Ambassador Building, St. Louis, Missouri, and

C. W. Ahner, Esq., 1023 Ambassador Building, St. Louis, Missouri, appearing on behalf of Mathieson Chemical Corporation, the Respondent.

Francis X. Ward, Esq., General Counsel, 222 East Michigan Street, Indianapolis, Indiana, appearing on behalf of United Brotherhood of Carpenters and Joiners of America, Local 1369, AFL, Charging Union.

Mr. Thermon L. Radford, 231 Chestnut Street, Morgantown, West Virginia, appearing on behalf of United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 152, AFL, and International Brotherhood of Electrical Workers, Local 425, AFL, Charging Unions.

[3] PROCEEDINGS

* * * * * * *

[38] THURMON L. RADFORD

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Thackery)

* * * * * * *

Q. You are business representative of Local 152 of the Pipe Fitters?

* * * * * * *

Q. Have you, within the last several years, represented your union in negotiations with Mathieson and Olin? A. I have.

* * * * * * *

[40] Q. (By Mr. Thackery) Did you at any time during the course of the negotiations represent any other unions, Mr. Radford? A. Yes, sir. Prior to beginning negotiations with the Mathieson Chemical Corporation we held a joint committee meeting between the three AF of L unions that represented certain of the employees, certain maintenance employees of the Mathieson Chemical Corporation, and I was chosen as the spokesman for the three unions, and by the "three unions" I mean the IBEW, Local [41] 425, and the Carpenters.

* * * * * * *

[49] Q. (By Mr. Thackery) I show you General Counsel's Exhibit 11 for identification, and ask you what that is. A. It is a copy of a letter sent from the Mathieson Chemical Corporation to me under date of March 15, 1954, advising me that the company would start to interview applicants for some of the jobs which were formerly filled by striking employees.

Q. Is that a copy, or is it the letter sent to you? A. This is the one that I received in the mail, in the mail.

Q. What did you do about that letter, if anything, Mr. Radford? A. I called the company and attempted to arrange a negotiation session with them.

Q. Whom did you talk to when you called the company? A. I think I first spoke with Mr. Gilliam, who referred me to Mr. Kileen.

Q. Did you talk to Mr. Kileen? A. I did.

Q. What did Mr. Kileen say? A. He said that if we had any proposals to make, to make them through the Federal Mediation and Conciliation Service.

(Mr. Thackery) Will the company stipulate that Thomas Kileen was the company attorney and negotiator at the times material herein for the company?

[50] (Mr. Stull) We will stipulate he was a company negotiator and attorney.

Q. (By Mr. Thackery) What did you do about that, Mr. Radford? A. I contacted Mr. Rose of the Federal Mediation and Conciliation Service, and advised him of the position the company had taken, and requested that he arrange a meeting.

Q. What happened about that, if anything? A. As I recall it, he advised me that Mr. Ahner—that is, this Mr. Ahner's father here—there were two involved—

Q. You will have to identify whom you are talking about. A. Mister—I think his initials are A. H. Ahner.

(Mr. Ahner) A. A. Ahner.

(The Witness) A. A. Ahner, Sr., whom I believe to be assistant to the president of the Mathieson Chemical Corporation, and he advised me he wasn't available for a meeting for a week.

Q. (By Mr. Thackery) Who advised you of that? A. Mr. Rose advised me that Mr. Ahner wasn't available for a meeting.

• • • • • • •

[56] Q. (By Mr. Thackery) I show you General Counsel's Exhibit 15 for identification and ask you what that is A. It is a copy of the seniority proposal of the company, which was made April 2, 1954, at that meeting.

• • • • • • •

[58] Q. If you know, Mr. Radford, were the production people laid off pursuant to this senority provision? A. No, sir. They were not. As a matter of fact, the company announced in the newspaper that they intended to lay our people off in accordance with this policy, and that they intended to lay off the District 50 people who represented the Production Workers; that they intended to lay them off strictly in accordance with the seniority provisions of their agreement which did not contain any such provision as this.

Q. Are you referring to employees represented by another union? A. Yes, sir.

• • • • • • •

[71] CROSS EXAMINATION

Q. (By Mr. Stull)

• • • • • • •

Q. Yes, there were. You testified with respect to the meeting [72] held on March 3rd, this year, at the company offices at the plant. At that time, Mr. Radford—the time of that meeting—was the proposal of the company clear to you? A. I can best answer your question by describing the meeting, if that is what you want me to do.

Q. Had you any—in order to save time here—had you any questions concerning the position of the company that remained unanswered at that meeting? A. At the outset of the meeting we asked you, or Mr. Dunn,—Thomas Dunn, our attorney—told you that he was appearing in behalf of our International and our local union, and that his purpose in doing so was in order that we did not prejudice our

rights in any manner whatsoever before the National Labor Relations Board in connection with charges that we had filed, and then we asked the company for their position, and the company outlined their position, after which I made certain proposals to the company, and then we took a recess, and during the time of that meeting you stated—you were at this particular meeting and were the principal spokesman for the company—I point that out because in the previous meetings Mr. Kileen had been principal spokesman for the company—and the question of the super-seniority or strike seniority for these employees were discussed at some length, and you said we had taken the case to the proper tribunal, that you people were willing to let the chips fall where they may, and with respect to [73] that particular provision.

We took your position to mean that you would leave the matter of the strike seniority clause to be adjudicated by the National Labor Relations Board, and it wouldn't necessarily, wouldn't be contained in any agreement we might reach with you, and that is a substantial factor, contributing factor, to why we notified you that we had agreed to these other items that had been in discussion, such as wages and hours.

Q. It was clear to you, wasn't it, Mr. Radford, that the company's proposal, as contained or as presented to you at the meeting of March 3rd, was that we enter into a contract embodying all of the changes that had been tentatively agreed upon during negotiations the previous year, with the exception of the seniority clause which would be as proposed by the company on April 2nd, at the meeting we had with you, and with the further exception of the wage schedules which would be revised upward to reflect a three-cent an hour increase for all employees in the bargaining units that you were discussing, was that not clear? A. Your question is quite lengthy. The answer is no in respect to the super-seniority. The proposal of the company—as I recall it,—with respect to the wages, was that you would increase the existing hourly wage rate three cents an hour. You would agree to the embodiment of all of the clauses which we had tentatively agreed upon prior to the strike,

and that we had [74] taken—you offered a one-year or a two-year agreement, whichever the unions preferred, and you stated that we had taken the super-seniority problem to the proper tribunal, and that you were willing to take your chances before the National Labor Relations Board in that respect and let the chips fall where they may.

• • • • • •

[78] Q. (By Mr. Stull) Did you get a letter from the company dated March 3rd, Mr. Radford? A. I think I did, yes.

Q. Would you recognize the copies of the proposals that were supplied to you at the conclusion of the March 3rd meeting, that we had available? A. That were supplied to me at the conclusion of the meeting?

Q. Yes. A. Almost at the outset of the meeting you stated there has been a lot of water gone over the dam since we met last, and that several proposals that the union had had, we had agreed upon prior to the strike, "we will provide you with copies of those agreements", and you did provide us with copies, if that's what you are getting at.

Q. And in addition to those we said there were some we were not in a position— A. You didn't have copies.

Q. Didn't have copies completed, but we would send them to you? A. That is correct.

Q. And did we send them to you? [79] A. Yes, sir. You sent some material to me.

Q. Yes. A. And included therein—as I recall it—was the super-seniority proposal of the company.

Q. That was with the letter of March 3rd? A. I think the letter was dated the same day we had our meeting at the plant, and I received it the next day, if I recall.

• • • • • •

[80] (Mr. Stull) May I ask these be marked for identification Respondent's exhibits.

(Thereupon, the documents above referred to were marked Respondent's Exhibits 1(a), (b) and (c) for identification.)

Q. (By Mr. Stull) I show you three papers which are

ditto copies, contract provisions, marked Exhibits 1(a), 1(b) and 1(c), and ask you if you recognize those as the enclosures which you received with the March 3rd letter, 1955? A. They may very well be the enclosures. I can't answer your question positively without checking over that to see what was contained in it. I have them over there.

Q. You have the ones you did receive? A. Yes.

Q. Subject to examination— A. I did receive this letter and I did receive some enclosures. Whether or not these are the specific ones,—there was quite a stack of them—whether or not these were the specific ones, I wouldn't know without checking.

(Trial Examiner) So we can dispose of the matter, if there be any objections, why don't you permit him to go to his bag and check it, and then you will know, yourself.

We will take a five-minute recess.

(Recess.)

[81] (Trial Examiner) On the record.

Q. (By Mr. Stull) Are you able to identify those three exhibits marked for identification as Respondent's Exhibit 1(a), 1(b) and 1(c), as having been received by you either at the meeting on March 3rd or with the letter the company sent you on March 3rd? A. I can.

* * * * * *

[104] WILLIS HELDRETH

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Thackery)

* * * * * *

Q. Where are you employed, Mr. Heldreth? A. Mathieson Chemical.

Q. What is your job there? A. Electrician.

Q. Do you belong to any union? A. I belong to IBE of IBEW, Local 425.

[105] Q. Are you an officer of that union? A. I was a steward. I guess I still hold that office.

Q. Directing your attention, Mr. Heldreth, to April 2, 1954, did you attend a collective bargaining meeting with the company? A. Yes, sir.

Q. Do you know to what I refer when I speak of the so-called super-seniority clause? A. Yes, I do.

Q. Can you tell me whether or not that clause was proposed at that meeting? A. The company proposed that.

Q. And what else happened to the clause, if you remember? A. We rejected the super-seniority clause. We didn't want no part of it.

Q. Do you remember who was the spokesman for the company? A. Yes, Mr. Kileen.

Q. Did he say anything about the seniority clause? A. Yes, he said that he felt that the ones that come across the picket line, and so forth, deserved a little—well, you might say a little something for helping support the breaking the strike.

• • • • • •

[106] Q. Directing your attention to the date of March 3rd, 1955, Mr. Heldreth, did you attend another meeting with the company? A. Yes, sir.

Q. Was Mr. Radford, who previously testified in this proceeding, present at that meeting? A. Yes, he was.

Q. Can you tell me whether or not the so-called super-seniority proposal was again discussed at that meeting? A. Yes, it was discussed at length.

Q. What was the provision of the unions with respect to that super-seniority clause at the March 3rd meeting? A. It was definitely out.

Q. The clause was out, is that your testimony? A. We wouldn't agree with that, wouldn't agree to nothing like that.

• • • • • •

[137] A. S. GILLIAM

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Stull) Mr. Gilliam, where are you employed? A. Olin Mathieson Chemical Corporation, Morgantown, West Virginia.

Q. How long have you been so employed? A. Three and one half years.

Q. In what capacity are you employed? A. Assistant Manager.

Q. Assistant Manager of the Morgantown operations? A. Right.

Q. Mr. Gilliam, did you attend, in your capacity as assistant manager, any of the negotiation meetings with the unions involved in these proceedings? A. I did.

Q. Did you attend a meeting held on March 3, 1955? A. I did.

• • • • • •

[149] CROSS EXAMINATION

Q. (By Mr. Thackery)

• • • • • •

[150] Q. Do you recall the following statements, and I quote from Respondent's Exhibit 4, statements by the parties at the meeting: Loring—strike that. "Radford:—No, that isn't it. I want to know if we have to agree on superseniority before agreeing on anything else. Stull: "No." Do you recall those statements? A. I recall a statement that Mr. Radford made, asking "if we insist on the clause as a condition of the agreement, would you reach an agreement without the clause?", to which Mr. Stull replied no, he thought he had made it clear.

• • • • • •

[151] M. BIRNEY WRIGHT

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Stull) Mr. Wright, where are you employed?

A. Employed by Olin Mathieson Chemical Corporation, Morgantown, West Virginia.

Q. In what capacity, Mr. Wright? A. As plant manager of the Morgantown operation.

• • • • • •

[158] CROSS EXAMINATION

Q. (By Mr. Thackery)

• • • • • •

[162] Q. Are you familiar with the fact that the so-called super-seniority proposal was given to the union on April 2nd? A. Yes.

Q. You knew that? A. I was told.

Q. You were told? A. Yes, sir.

Q. Did you take any action pursuant to that? A. In making up the list of people to be laid off, and working with the staff, those men were omitted from the layoff, those were made up from the proper people in the plant.

Q. When did you make that list up? A. In all probability it was studied, tentatively made up, a few days prior to March the 29th.

Q. March 29th? A. March 29th. Remember, that was not final.

Q. Is that 1954? A. 1954.

• • • • • •

GENERAL COUNSEL'S EXHIBIT No. 4-A

AGREEMENT

Between

Mathieson Chemical Corporation
Morgantown Operations
Morgantown, West Virginia

and

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada

A. F. L.

Local Union No. 152

* * * * * *

ARTICLE IV

SENIORITY

Section 1. Seniority, as used herein, is defined as the right accruing to employees through length of service which entitles them to certain preferences as stated in this Agreement.

Section 2. (a) Seniority accrued by each employee shall be of two types, Plant Seniority and Work Group Seniority.

(b) The Plant Seniority of each employee who has completed his sixty (60) day probationary period shall be measured by the years, months, and days from the date of his last employment by the COMPANY at this Plant. The probationary period cannot be extended or renewed.

(c) There shall be three Work Groups applicable to all employees covered by this Agreement, namely:

Instrument Mechanics and helpers
Pipefitters and helpers
Welders and helpers

Work Group Seniority shall be based on the employee's period of service in his particular Work Group, starting with the first day that he is permanently assigned to a job

classification in the particular Work Group, and calculated in the same manner as Plant Seniority in (b) above.

Section 3. (a) When a vacancy occurs in one of the journeyman classifications in a Work Group, such vacancy shall be filled by a qualified employee from within that Work Group.

(b) An employee's qualifications for such vacancy shall be based on skill and ability. When skill and ability are equal, Work Group Seniority shall govern.

(c) Employees in lower job classifications shall be given the first opportunity to fill vacancies in higher job classifications through standard tests and determinations of skill and ability. The UNION shall have the opportunity of participating in such determinations.

Section 4. (a) In determining length of continuous service, no deduction shall be made for any lost time due to non-occupational injury or illness which does not exceed six (6) months. At the end of such six (6) month period, the employee shall not accrue additional seniority, but shall retain his accumulated seniority for a period not to exceed one (1) year.

(b) Any employees covered by this Agreement who incurs a compensable injury or disease while on duty shall continue to accumulate seniority for a period not to exceed one (1) year while absent for such reason. If the employee does not then return to work he shall cease to accumulate seniority but shall retain his accumulated seniority for a period not to exceed two (2) years.

(c) An employee, who returns to work within the periods specified in (a) and (b), hereof, after an absence due to a non-occupational or compensable injury or disease, shall be reinstated to his former position with full seniority right, provided that:

He is physically and mentally qualified to do the work, and that his job has not been abolished in the meantime or filled by an employee of greater seniority.

Said physical and mental qualifications shall be determined by the plant physician. If the decision of the plant

physician is not satisfactory to the employee, he may request an examination by a licensed physician who must be mutually agreed upon by the COMPANY, Employee, and UNION, and the decision of such physician shall be final. All expenses in connection with such requested examinations shall be borne by the COMPANY. The COMPANY will attempt to find suitable work, if available, for any such employee who is unable to return to his former position.

(d) The re-employment of employees who enter the Armed Services, either by draft or enlistment, shall be governed by the provisions of the Selective Service Act as amended or by such other than current statutory enactment controlling military veterans re-employments rights.

Section 5. (a) Reduction in force shall take place from the journeyman classifications and the helper classification. Layoffs from the journeyman classifications will be governed by Work Group Seniority regardless of the employees' job classification. Layoffs from the helper classification will be governed by Work Group Seniority. When Work Group Seniority is equal, Plant Seniority shall govern.

If the operation of this seniority clause tends to eliminate skills which would be required in the efficient operation of the Plant, the UNION will work out with the COMPANY a program which will permit the retention of skills necessary to continued efficient operation of the Plant.

(b) A disabled employee shall not be subject to layoff within the first six (6) months of disability or until such time as the plant physician certifies that the employee is able to return to active duty, whichever is earlier. Such employees will be expected to co-operate with the physician in following such advice and directions as may be given. If the employee's seniority at the time of a reduction in force is such that he would be subject to layoff, he shall not continue to accrue seniority after the date of reduction in force.

Section 6. (a) When adding to the force, employees released in accordance with Section 5 will be recalled in the reverse order in which they were laid off, and their seniority shall be restored to the status as of the date of layoff, ex-

cept that no employee who has been laid off for a period of more than one (1) year shall have a right to reinstatement.

(b) Employees being recalled shall be notified by Registered Mail, Return Receipt Requested, mailed to the last address on record in the COMPANY'S files. It shall be the duty of the employee to keep the COMPANY properly advised of his correct address.

(c) If an employee does not notify the COMPANY within forty-eight (48) hours after receiving his notice to return to work that he intends to return to work within ten (10) calendar days from receipt of notice, or if he does not report for work within five (5) calendar days after receipt of notice, the COMPANY may then fill the job for which he was recalled.

(d) An employee who fails to notify the COMPANY or fails to return to work as provided in (c) above, may retain his standing on the recall list if he personally reports to the COMPANY within thirty (30) days from the date of recall and advises the COMPANY of his desire to retain his standing on the list. An employee cannot exercise this privilege on more than one occasion.

Section 7. (a) Employees who voluntarily quit or who are discharged for just cause shall forfeit all seniority rights.

(b) Employees who have been laid off and are not reinstated within one (1) year following date of layoff shall forfeit all seniority rights.

(c) Employees who lose their seniority rights shall be considered as new employees if again employed by the COMPANY.

Section 8. Any employee promoted to a supervisory position, as defined in the Labor-Management Relations Act, shall not accumulate seniority during the time he is acting as a Supervisor, but such employee shall not lose accumulated seniority accrued at the time of his promotion for a period of one (1) year from the date of assumption of such supervisory duties.

Section 9. The COMPANY agrees to compile and furnish semi-annually to the UNION a seniority list showing the seniority of each employee covered by this Agreement.

• • • • • •

GENERAL COUNSEL'S EXHIBIT No. 16

UNITED ASSOCIATION

of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada

Suite 502 — Ring Building — Washington 6, D. C.

Local Union 152, City Morgantown, State W. Va.
Date April 20, 1954

231 Chestnut Street
Morgantown, West Virginia

Mathieson Chemical Corporation
P. O. Box 888
Morgantown, West Virginia
Gentlemen:

On April 16, 1954, I telephoned the Mathieson Chemical Corporation and requested of Mr. T. E. Kileen a negotiation session between the Mathieson Chemical Corporation and the 3 AFL Unions which represent certain of the Company's employees.

Mr. Kileen stated that the Company did not wish to meet and suggested that we submit our proposals in writing. Since, apparentley, we have no other alternative, we are submitting, in part, our proposals. In doing so, we would like to point out that this is a very impractical method of resolving the many issues that remain unresolved. These proposals are being submitted in behalf of U. A. Local Union No. 152, I. B E. W Local Union No. 425, and Carpenters Local Union No. 1369.

The 3 AFL Unions propose that the Company and the Union sign an Agreement which would continue in effect until February 10, 1955 and which would include all clauses tentatively agreed upon prior to the strike; and which would include all clauses appearing in the old Agreement, which expired February 10, 1954, over which there has been no

GENERAL COUNSEL'S EXHIBIT No. 20

UNITED ASSOCIATION

of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada

Suite 502 — Ring Building — Washington 6, D. C.

Local Union 152, City Morgantown, State W. Va.

Date February 15, 1955

231 Chestnut Street
Morgantown, West Virginia

Mr. M. B. Wright, Manager
Mathieson Chemical Corporation
Morgantown Plant
P. O. Box 888
Morgantown, West Virginia

Dear Sir:

We received your letter of February 12, 1955.

On behalf of United Association Local Union No. 152, I. B. E. W. Local Union No. 425, and Carpenters and Joiners Local Union No. 1369, please be advised that we are ready and willing (as we have been in the past) to enter into discussions on any and all matters which may lead to the consummation of a collective bargaining agreement between your Company and our Unions.

May we point out to you that in your letter of April 27, 1954, you refused to hold any further meetings with us. Among the many issues that had not been resolved at the time of your letter, of April 27, 1954, were such items as wages, fringe benefits, jurisdiction of work, elimination of "no-strike" clause, etc.

As a result of the discriminatory manner in which your Company laid off certain employees on April 9, 1954, certain new issues have arisen. We feel that the reinstatement with back pay of all employees who lost their jobs as a result of your Company's unilateral action in changing the seniority standing of employees is a proper subject for

discussion. We, also, feel that abandonment of your insistence upon a super-seniority arrangement for employees who crossed the picket line or remained at work during the strike is a proper subject for discussion.

GENERAL COUNSEL'S EXHIBIT No. 24-a

AGREEMENT

THIS AGREEMENT made and entered into as of the day of 1955, by and between OLIN MATHIESON CHEMICAL CORPORATION, for its Morgantown Operations, hereinafter referred to as the "COMPANY", and the UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL UNION No. 152, AFL, hereinafter referred to as the "UNION."

WITNESSETH:

It is mutually agreed as follows:

• • • • • •

ARTICLE IV

SENIORITY

Section 1. Seniority, as used herein, is defined as the right accruing to employees through length of service which entitles them to certain preferences as stated in this Agreement.

Section 2. (a) Seniority accrued by each employee shall be of two types, Plant Seniority and Work Group Seniority.

(b) The Plant Seniority of each employee who has completed his sixty (60) day probationary period shall be measured by the years, months, and days from the date of his last employment by the COMPANY at this plant. The probationary period cannot be extended or renewed.

(c) There shall be three Work Groups applicable to all employees covered by this Agreement, namely:

Instrument Mechanics and helpers
Pipefitters and helpers
Welders and helpers

Work Group Seniority shall be based on the employee's period of service in his particular Work Group, starting with the first day that he is permanently assigned to a job classification in the particular Work Group, and calculated in the same manner as Plant Seniority in (b) above.

Section 3. (a) When a vacancy occurs in Mechanic 1st Class or Mechanic 2nd Class classifications in a Work Group, such vacancy shall be filled by a qualified employee from within that Work Group provided that there is no one on layoff subject to recall to said Mechanic 1st Class or 2nd Class classifications in a Work Group.

It is understood that if there is anyone on layoff subject to recall that the provisions contained in Section 6(a) of this Article shall take effect before the provisions of this Section 3(a) take effect.

(b) An employee's qualifications for such vacancy shall be based on skill and ability. When skill and ability are equal, Work Group Seniority shall govern.

(c) Employees in lower job classifications shall be given the first opportunity to fill vacancies in higher job classifications through standard tests and determinations of skill and ability, provided that there is no one on layoff subject to recall to said higher job classifications. It is understood that if there is anyone on layoff subject to recall that the provisions contained in Section 6(a) of this Article shall take effect before the provisions of this Section 3(c) take effect. The UNION shall have the opportunity of participating in such determinations.

Section 4. (a) In determining length of continuous service, no deduction shall be made for any lost time due to non-occupational injury or illness which does not exceed six (6) months. At the end of such six (6) month period, the employee shall not accrue additional seniority, but shall retain his accumulated seniority for a period not to exceed one (1) year.

(b) Any employee covered by this Agreement who incurs a compensable injury or disease while on duty shall continue to accumulate seniority for a period not to exceed one (1) year while absent for such reason. If the employee does not then return to work he shall cease to accumulate seniority but shall retain his accumulated seniority for a period not to exceed two (2) years.

(c) An employee who returns to work within the periods specified in (a) and (b) hereof, after an absence due to a non-occupational or compensable injury or disease, shall be reinstated to his former position with full seniority right, provided that:

He is physically and mentally qualified to do the work, and that his job has not been abolished in the meantime or filled by an employee of greater seniority.

Said physical and mental qualifications shall be determined by the plant physician. If the decision of the plant physician is not satisfactory to the employee, he may request an examination by a licensed physician who must be mutually agreed upon by the COMPANY, Employee, and UNION, and the decision of such physician shall be final. All expenses in connection with such requested examinations shall be borne by the COMPANY. The COMPANY will attempt to find suitable work, if available, for any such employee who is unable to return to his former position.

(d) The re-employment of employees who enter the Armed Services, either by draft or enlistment, shall be governed by the provisions of the Selective Service Act as amended or by such other then current statutory enactment controlling military veterans re-employment rights.

Section 5. (a) Reduction in force shall take place from the Mechanics 1st and 2nd Class classifications, as one group, and the helper classification, as another group. Layoffs from the Mechanics 1st Class and Mechanics 2nd Class classifications will be governed by Work Group Seniority regardless of the employees' job classification. Layoffs from the helper classification will be governed by Work Group Seniority. When Work Group Seniority is equal, Plant Seniority shall govern.

Anything in this Article IV on seniority to the contrary notwithstanding, employees in the journeyman classification and employees in the helper classification within a Work Group covered by this Contract who were not at work from February 25, 1954, until, at or after noon on March 17, 1954, shall be laid off before any employee so classified in the same Work Group who remained at or returned to work or was hired during the period from February 25, 1954, to noon March 17, 1954, is laid off.

If the operation of this seniority clause tends to eliminate skills which would be required in the efficient operation of the Plant, the UNION will work out with the COMPANY a program which will permit the retention of skills necessary to continue efficient operations of the Plant.

(b) A disabled employee shall not be subject to layoff within the first six (6) months of disability or until such time as the plant physician certifies that the employee is able to return to active duty, whichever is earlier. Such employees will be expected to co-operate with the physician in following such advice and directions as may be given. If the employee's seniority at the time of a reduction in force is such that he would be subject to layoff, he shall not continue to accrue seniority after the date of reduction in force.

Section 6. (a) When adding to the force, or when filling vacancies, employees released in accordance with Section 5 will be recalled in the reverse order in which they were laid off, and their seniority shall be restored to the status as of the date of layoff, except that no employee who has been laid off for a period of more than one (1) year shall have a right to reinstatement.

(b) Employees being recalled shall be notified by Registered Mail, Return Receipt Requested, mailed to the last address on record in the COMPANY'S files. It shall be the duty of the employee to keep the COMPANY properly advised of his correct address.

(c) If an employee does not notify the COMPANY within forty-eight (48) hours after receiving his notice to return to work that he intends to return to work within ten (10)

calendar days from receipt of notice, or if he does not report for work within five (5) calendar days after receipt of notice, the COMPANY may then fill the job for which he was recalled.

(d) An employee who fails to notify the COMPANY or fails to return to work as provided in (c) above, may retain his standing on the recall list if he personally reports to the COMPANY within thirty (30) days from the date of recall and advises the COMPANY of his desire to retain his standing on the list. An employee cannot exercise this privilege on more than one occasion.

Section 7. (a) Employees who voluntarily quit or who are discharged for just cause shall forfeit all seniority rights.

(b) Employees who have been laid off and are not reinstated within one (1) year following date of layoff shall forfeit all seniority rights.

(c) Employees who lose their seniority rights shall be considered as new employees if again employed by the COMPANY.

Section 8. Any employee promoted to a supervisory position, as defined in the Labor-Management Relations Act, shall not accumulate seniority during the time he is acting as a Supervisor, but such employee shall not lose accumulated seniority accrued at the time of his promotion for a period of one (1) year from the date of assumption of such supervisory duties.

Section 9. The COMPANY agrees to compile and furnish semi-annually to the UNION a seniority list showing the seniority of each employee covered by this Agreement.

RESPONDENT'S EXHIBIT No. 4

Meeting With Representatives of AFL Unions

March 3, 1955

The meeting was called at 10:40 A. M.

Present Unions

United Association of Plumbers and Pipefitters
Thomas L. Dunn, Ass't. General Counsel
Len G. Loring, International Representative
T. L. Radford, Business Agent
Arby Norris, former Steward (pipefitter)
Hugh A. Radcliff, (instrument mechanic)

Carpenters and Joiners
C. M. Slinker, International Representative
D. L. Harbert, Local 1369
C. L. Canterbury, President, Local 1369

International Brotherhood of Electrical Workers
W. A. Berry, Business Agent
Willis Heldreth, former Steward

Company
H. W. Stull
A. S. Gilliam
W. T. Webb

Loring—That's settling a strike and leaving the strikers outside.

Stull—Everyone involved was working under a Contract. None were new employees. All were member of the Union.

Loring—Some of our members thought their first loyalty was to the Company and they came to work. Now you changed seniority and you are favoring those loyal to the Company over those who were loyal to their Union.

Stull—I think the thing that counts is loyalty to the job and keeping this facility running. Many realize this plant has shut down before and they don't want to see that happen again.

RESPONDENT'S EXCEPTION No. 7

7. Exception is taken to the finding on page 8, folios 10-22, that Respondent sought to establish "that the unions, on March 3, actually agreed to permit inclusion of the disputed clause in written agreements", upon the grounds that it is not supported by the evidence and is an inaccurate interpretation of the evidence introduced. Regardless of what "appears" (page 8, folio 12) to the Trial Examiner to be the case relative Respondent's "apparent claim" (page 8, folio 16) or Respondent's "apparent position", (page 9, folio 12) any question concerning the matter is resolved by reference to the notes of the March 3 meeting (R. Ex. 4) and to Respondent's letter of March 21 (G. C. Ex. 25) which the Trial Examiner quotes only in part to show clearly that Respondent was merely *proposing* the "strike-seniority provision".

[fol. 26] Argument and submission—March 20, 1956
(Omitted in printing)

[fol. 27] [File Endorsement Omitted]

IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7127

OLIN MATHIESON CHEMICAL CORPORATION, PETITIONER

versus

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Review of an Order of the National Labor Relations Board

Argued March 20, 1956

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

William A. Stuart and H. W. Stull for Petitioner; and Owsley Vose, Attorney, National Labor Relations Board, (Theophil C. Kammholz, General Counsel; David P. Findling, Associate General Counsel; Marcel Mallet-Prevost, Assistant General Counsel, and Nancy M. Sherman, Attorney, National Labor Relations Board, on brief) for Respondent.

[fol. 28] OPINION—April 9, 1956

DOBIE, Circuit Judge:

This case is before us upon the petition of the Olin Mathieson Chemical Corporation (hereinafter called Olin) to review and set aside an order of the National Labor Relations Board (hereinafter called the Board) issued against petitioner and Mathieson Chemical Corporation, its predecessor in interest, on October 18, 1955, following the usual

proceedings under Sections 9 and 10 of the National Labor Relations Act (61 Stat. 136, 29 U.S.C., Secs. 151, et seq.,) (hereinafter called the Act). In its answer to the petition, the Board has requested enforcement of its order.

The Board's order required Olin to cease and desist from the unfair labor practices found, or from in any other manner interfering with, restraining, or coercing its employees in the exercise of their statutory rights. Affirmatively, Olin was required to reinstate the unlawfully laid-off employees and make them whole for any loss of pay they may have suffered as a result of the discrimination against them; to rescind its discriminatory seniority policy and to restore all employees affected thereby to the seniority they would have enjoyed absent such discriminatory policy; upon request, to bargain with the Unions with respect to the units of which they are the respective certified representatives; and to post appropriate notices.

Two questions are presented to us:

(1) Whether the Board properly found that the Company violated Section 8(a)(3) and (1) of the Act by changing its seniority policy after a strike to give preference to nonstrikers and to employees who had returned to work during [fol. 29] the strike, and by laying off seven employees pursuant to its new policy.

(2) Whether the Board properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively in good faith with the Unions.

The Board found, in agreement with the Trial Examiner, that Olin changed its seniority policy after the strike so as to give preference to employees who had worked during the strike in order to discipline employees adhering to the strike until the very end and that Olin's action in this regard, and its further action, pursuant to its new policy, in laying off seven employees who would not have been laid off under Olin's former seniority policy, was violative of Section 8(a)(3) and (1) of the Act. The Board further found, upon the basis of the entire course of the bargaining, and particularly, in view of the Company's insistence upon superseniority for nonstrikers or returning strikers, that the Com-

pany, therefore, had refused to bargain collectively in good faith in violation of Section 8(a)(5) and (1) of the Act.

In 1952, the Unions were certified by the Board as the bargaining representatives of the employees. Thereafter, Olin entered into collective bargaining agreements with the Unions, which were to expire February 10, 1954. No new agreements were effected before the strike on February 24, 1954.

We think we must uphold these findings of the Board, that we must deny Olin's petition to set aside the order of the Board, and that the Board's petition to enforce its order must be granted.

[fol. 30] Section 8(a)(3) of the Act forbids an employer by discrimination in regard to hire and tenure of employment to discourage membership in any labor organization. The protection of Section 8(a)(3) extends to "all elements of the employment relationship which in fact customarily attend employment and with respect to which an employer's discrimination may as readily be the means of interfering with employees' right of self-organization as if these elements were precise terms of a written contract of employment." *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U.S. 206, 218. Moreover, Olin's superseniority policy is in conflict with Section 13 of the Act, providing that "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike * * *." 29 U.S.C. Sec. 163. As was said in the *per curiam* opinion in *Republic Steel Corporation* v. *National Labor Relations Board*, 114 F. (2d) 820, 821: "We think it was the intention of the Board, as it was of this court, to provide that upon reinstatement the striking employees were to be treated in all matters involving seniority and continuity of employment as though they had not been absent from work." See, also, *National Labor Relations Board* v. *Industrial Cotton Mills*, 208 F. (2d) 87, cert. denied 347 U.S. 935, *Home Beneficial Life Insurance Co.* v. *National Labor Relations Board*, 159 F. (2d) 280, cert. den. 332 U.S. 758.

Olin does not dispute the fact that the promulgation and implementation of its superseniority policy was discrimina-

tory in favor of employees abandoning or not participating in the strike and against those remaining on strike until it was called off. Nor does Olin deny that its action discouraged union activities. Olin's contention is twofold. First, relying on the Mackay Radio decision of the Su- [fol. 31] preme Court, *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, Olin contends that it was permissible, as a measure necessary to "protect and continue" its business, for it to replace the strikers with new employees, and hence it was proper (since the greater includes the less) for it to take the not so drastic action of depriving the strikers of seniority for layoff purposes in order to accomplish this same objective. Second, Olin contends that its conduct is sanctioned by the decision of the Ninth Circuit in the case of *National Labor Relations Board* v. *Potlatch Forests, Inc.*, 189 F. (2d) 82.

The Mackay decision merely holds that an employer need not displace employees hired during an economic strike to make room for returning strikers. And, in the opinion in that case, Mr. Justice Roberts went on to say (304 U. S. at pages 345-346):

> "Nor was it an unfair labor practice to replace the striking employes with others in an effort to carry on the business. Although §13 provides, 'Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike,' it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only [fol. 32] so many of the strikers as there were vacant places to be filled."

But the situation before us is quite different. The strike was over, the strikers had returned to work. The Olin

plant was in full operation. No promise, when they were employed, was made to the employees who remained at work during the strike, or who returned to work before the end of the strike, that their employment would be permanent. Olin, after the strike, when there was no necessity for such action to keep its plant in operation, promulgated its superseniority policy in favor of the so-called "loyal employees" and against those who returned to work after the strike had failed and was over. Olin was clearly penalizing the strikers for exercising their right to strike and was thereby clearly discouraging any exercise of this right in the future. This, we think, Olin cannot lawfully do. Olin's attorney, Stull, admitted in one of the conferences with Union representatives that Olin's insistence on the superseniority plan was motivated by Olin's preference for the employees who had been loyal to Olin by helping to break the strike, and also Olin's concern that the plant be not "shut down again."

The 7 employees unlawfully discharged were part of some 94 maintenance men laid off pursuant to Olin's new policy. These 7 had not worked during the strike but they had been hired by Olin prior to a corresponding number of retained employees who had worked during the strike.

It is quite obvious that Olin's application of the superseniorty policy here tended to discourage future strikes. Said Mr. Justice Reed, in *Radio Officers' Union* v. *National* [fol. 33] *Labor Relations Board*, 347 U. S. 17, 45: "Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement."

Olin relies heavily upon the Potlach case, *supra*, and there is much in Circuit Judge Orr's opinion that lends support to Olin's contention. The only important factual difference between Potlatch and our case seems to be "Potlatch advocated 'strike seniority' before the strike was settled, adopted that policy at the time of settlement and has consistently maintained that policy at all times thereafter." 189 F. (2d) at page 86. There was also doubt expressed in Judge Orr's opinion as to the motivation in applying the superseniority clause. Said Judge Orr (189 F. (2d) at

page 86): "In the instant case, therefore, the 'discriminations' between replacements and strikers is not an unfair labor practice despite a tendency to discourage union activities, because the benefit conferred upon the replacements is a benefit reasonably appropriate for the employer to confer in attempting 'to protect and continue his business by supplying places left vacant by strikers.' " In our case, the replacements seem all to have been old employees; in Potlatch, the replacements included both old and new employees.

From Judge Orr's opinion, we quote further (189 F. (2d) at page 86):

> "The record here does not disclose that Potlatch in fact assured the replacements that 'their places might be permanent'; however, that assurance need not be proved. The Supreme Court in the Mackay Radio case [fol. 34] was concerned not so much with an explicit promise of permanent tenure as with the propriety of the employer's concern for that tenure."

With this, we disagree. With a strike in progress, the primary concern of the employer is to keep his plant in operation. It is then proper for an employer, who might be unable to procure replacements save upon a promise of permanent tenure, to promise such tenure to the replacements. But when the strike is over, when the plant is in operation, then the imposition of the superseniority policy in favor of the replacements and against the strikers is quite a different matter. That is the case before us. There is nothing in the record here to show that, at the time Olin secured these replacements for the strikers, Olin made any promise of permanent tenure to these replacements. And we do not read the Mackay case as condoning this conduct on the part of Olin.

When it became apparent to the Unions that the strike was lost, they sought to resume negotiations with Olin. Olin's response was that they should make their proposals through the Federal Mediation and Conciliation Service. Finally, after delaying answering the Union's letter of March 23 formally requesting a bargaining meeting, Olin arranged a meeting on April 2. At this meeting Olin, while

offering to sign contracts with the Unions containing all provisions previously agreed to, demanded that the Unions agree to the incorporation in the seniority clause of the superseniority policy adopted after the strike. Despite the Unions' objections to this proposal, Olin a few days later nevertheless, and without further consultation with the Unions, effected a layoff in accordance with this policy.

Olin shortly thereafter refused to meet with the Unions, [fol. 35] stating that if the Unions had any proposals to make they should be submitted in writing. When the Unions subsequently submitted such proposals in writing, including a decreased wage demand, Olin rejected them, stated that it would not recede from its superseniority policy or from its refusal to grant a wage increase, and refused to meet further with the Unions on the ground that such action would be "futile".

The parties again met about ten months later, and although they were in agreement on all other issues, Olin still insisted on the incorporation of its superseniority policy in the contract. Although the Unions argued that this clause was illegal and that the decision on this issue should be held in abeyance until the Board had had a chance to pass on the question—and even offered to amend the proposed agreement to include this provision if the Board upheld its legality—Olin nevertheless persisted in its demnad for the inclusion of this provision in the agreement.

On these facts we must uphold the Board's finding that Olin violated Section 8(a) (5) and (1) of the Act by refusing to bargain collectively in good faith with the Unions.

It seems only fair to state that the record shows no past background of hostility towards the Unions on the part of Olin. Nor was there here any discrimination between employees who did belong to the Unions and those who did not; for all the employees involved were Union men.

For the reasons stated, we must decree enforcement of the Board's order requiring Olin to reinstate the employees unlawfully laid off under the superseniority policy and to make them whole for any loss of pay suffered; to rescind its [fol. 36] discriminatory policy; to bargain collectively in good faith with the Unions; and to post appropriate notices.

Order of the Board enforced.

SOPER, Circuit Judge, dissenting:

The opinion of the court is in direct conflict with that of the Ninth Circuit in *N.L.R.B.* v. *Potlatch Forests*, 189 F. 2d 82, which is not distinguishable in any essential feature, and presents in my opinion a reasonable approach to the problem under consideration. I base this dissent on the following passage from that opinion: (p. 86)

> "In the instant case, therefore, the 'discrimination' between replacements and strikers is not an unfair labor practice despite a tendency to discourage union activities, because the benefit conferred upon the replacements is a benefit reasonably appropriate for the employer to confer in attempting 'to protect and continue his business by supplying places left vacant by strikers.' Hence, we think the specific question posed here has been answered by the Supreme Court by recognizing that an employer attempting to fill a number of positions must be able to offer a substantial degree of security (as well as attractive wages), and that an employer may properly assure the replacements that [fol. 37-38] 'their places might be permanent.' If there are not enough jobs to go around at the time the strike is settled the rights of replacements prevail over strikers.
>
> While the Mackay Radio case (304 U.S. 333) can be formally distinguished on the ground that the Supreme Court in that case was considering a shortage of jobs at the time the strike was settled, rather than a shortage caused by a later curtailment of activities, the assurance of permanent employment in the latter event is equally justifiable."

[fol. 39] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7127

OLIN MATHIESON CHEMICAL CORPORATION, Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD, Respondent

On Petition for Review of an Order of the National Labor Relations Board

JUDGMENT—April 9, 1956

This cause came on to be heard upon the petition of the Olin Mathieson Chemical Corporation to review and set aside a certain order issued against it by the National Labor Relations Board on the 18th day of October, 1955, in a proceeding before the Board numbered 6-CA-835, 6-CA-836 and 6-CA-837, entitled "In the Matter of Mathieson Chemical Corporation and/or Olin Mathieson Chemical Corporation and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 152, AFL, and United Brotherhood of Carpenters and Joiners of America, Local 1369, AFL, and International Brotherhood of Electrical Workers, Local 425, AFL": upon the answer of the National Labor Relations Board and cross-petition for enforcement of said order; upon the transcript of the record in said proceeding; and the said cause was argued by counsel.

On consideration whereof, it is ordered, adjudged and decreed this 9th day of April, 1956, by the United States Court of Appeals for the Fourth Circuit, that the order of the Board in said proceeding be enforced, and that the Olin Mathieson Chemical Corporation abide by and perform [fol. 40] the directions of the National Labor Relations

Board in said order contained, in accordance with the opinion of this Court.

John J. Parker, Chief Judge, Fourth Circuit. Armistead M. Dobie, United States Circuit Judge.

I dissent:

Morris A. Soper, United States Circuit Judge.

[fol. 41] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 42] Supreme Court of the United States, October Term, 1956

No. 153

[Title omitted]

Order Allowing Certiorari—Filed October 8, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office - Supreme Court, U. S.
JUN 9 1956
HAROLD B. WILLEY, Clerk

In the

Supreme Court of the United States

October Term, 1955

No. [redacted] 153

OLIN MATHIESON CHEMICAL CORPORATION,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

WM. A. STUART
188 East Main Street
Abingdon, Virginia
Counsel of Record for Petitioner

H. W. STULL, *Labor Counsel*
Olin Mathieson Chemical Corporation
460 Park Avenue
New York 22, New York
Of Counsel

SUBJECT INDEX

Page

(a) Citations of the Opinions Below 2

(b) The Grounds on Which the Jurisdiction of This Court Is Invoked 3

(c) The Questions Presented for Review 4

(d) The Statutes Involved 4

(e) Statement of the Case 5

1. The Basis of Federal Jurisdiction of the Court Below 5
2. The Board's Decision 5
3. The Background of the Case 6
4. The Lay-offs 7
5. The Potlatch Case 9
6. Petitioner's Motivation 9
7. The Alleged Refusal to Bargain 10

(h) The Argument 11

1. The Decisions of the Ninth Circuit in the Potlatch Case and of the Fourth Circuit in the Present Case Are in Sharp Conflict 11
2. The Question Presented, Relative to the Right of an Employer to Replace Economic Strikers with Returning Strikers, Should Be Settled by This Court Because It Is Important in the Administration of the Act 12
3. The Court Below Erred in Construing the Act as Forbidding the Replacements 12

(A) Petitioner Had the Right to Replace the Strikers 12

(B) Petitioner's Actions Were Not Within the Prohibition of Sections 8(a)(3) and 8(a)(1) 17

Page

Opinion, Olin Mathieson Chemical Corporation v. National Labor Relations Board, ... F. 2d ..... (Apr. 9, 1956) ..... App. 1

Opinion, National Labor Relations Board v. Potlatch Forests, Incorporated, 189 F. 2d 82 ..... App. 11

TABLE OF AUTHORITIES

Aeronautical Lodge v. Campbell, 337 U. S. 521, 526 13

Medo Photo Supply Corp. v. National Labor Relations Board, 321 U. S. 678 14

National Labor Relations Board v. Mackay Radio & Telegraph Co., 304 U. S. 333, 345-6 12

National Labor Relations Board v. Penokee Veneer Co., 168 F. 2d 868 15

National Labor Relations Board v. Potlatch Forests, Inc., 189 F. 2d 82 ..... 2, 3, 9, 11, 12, 16, 20

National Labor Relations Board v. James Thompson & Co., 208 F. 2d 743 15

National Labor Relations Board v. Del E. Webb Construction Co., 196 F. 2d 702 ..... 17, 18

Texas Co. v. National Labor Relations Board, 198 F. 2d 540 .. 17, 18

In the

Supreme Court of the United States

October Term, 1955

No. .....

OLIN MATHIESON CHEMICAL CORPORATION,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Olin Mathieson Chemical Corporation, which was the petitioner below on petition to review and set aside an order of the National Labor Relations Board which was respondent below, hereby prays that a writ of certiorari issue to review the decree entered by the United States Court of Appeals for the Fourth Circuit on the 9th day of April, 1956, with accompanying opinion by Judge Dobie

concurred in by Judge Parker, and dissenting opinion by Judge Soper, enforcing the said order of the National Labor Relations Board.

In this petition, the respondent is called the "Board," the charging Unions are called the "Unions," and the National Labor Relations Act as amended by the Labor Management Relations Act of 1947 is called the "Act." Page references to the appendices filed by the parties in the court below are in parenthesis: "PA" prefixed indicating petitioner's appendix, and "RA" respondent's appendix. All italics are petitioner's unless otherwise indicated.

Complying with Rule 21, petitioner has filed nine copies of the appendices filed by both parties below, together with a copy of all the proceedings in the court below, the whole duly certified.

(a)

CITATIONS OF THE OPINIONS BELOW

The Board's decision is cited as *Mathieson Chemical Corporation and/or Olin Mathieson Chemical Corporation and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 152, AFL, et al*, 114 NLRB, No. 85 (Oct. 18, 1955). This decision is printed in the petitioner's appendix below.

The decision of the court below is cited as *Olin Mathieson Chemical Corporation* v. *National Labor Relations Board*, ... F. 2d ..... (Apr. 9, 1956). The majority and dissenting opinions therein are appended hereto, together with the opinion of the Court of Appeals for the Ninth Circuit in the conflicting decision of *National Labor Relations Board* v. *Potlatch Forests, Inc.*, 189 F. 2d 82 (App. p. 11).

(b)

THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

1. Petitioner invokes the jurisdiction of this Court upon the following grounds:

(i) The decision of the court below is in conflict with the decision of the Court of Appeals for the Ninth Circuit in the case of *National Labor Relations Board* v. *Potlatch Forests, Inc., supra* (App. 11), involving the same question.

(ii) The court below has decided a question of interpretation of the Act, *relative to the right of an employer to replace economic strikers,* which has not been, but should be, settled by this Court on account of its importance in the administration of the Act.

(iii) The court below has erroneously construed and applied Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Act.

2. (i) The date of the decree of the court below was April 9, 1956, and it was entered at the same time.

(ii) No order has been entered herein respecting a rehearing or granting an extension of time within which to petition for certiorari.

(iii) The provisions of U. S. Code, Title 28, Sec. 1254, are believed to confer on this Court jurisdiction to review the decree in question by writ of certiorari.

(c)

THE QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

1. Was it an unfair labor practice, absent a contract and absent evidence of anti-union motivation, for petitioner to replace, in order of seniority with respect to future lay-offs, the employees who remained out until the end of the strike, by junior employees who crossed the picket lines and returned to work before the end of the strike, so that those who remained out until the end of the strike were in a lower seniority group with respect to liability to future lay-offs, than those then at work?

2. Was it a refusal to bargain, for petitioner to maintain the replacements mentioned in question No. 1, after bargaining thereon with the Unions to an impasse?

3. Exclusive of question numbered 2, was petitioner otherwise guilty of refusal to bargain, under the facts attending its negotiations with the Unions?

(d)

THE STATUTES INVOLVED

Section 8(a) of the Act defines the unfair labor practices of the employer. The Board has found that petitioner violated Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Act (PA 38, 40). So far as pertinent, they are as follows:

> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;"
>
> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . ."

"(5) to refuse to bargain collectively with the representatives of his employees, . . ."

Since Section 8(a)(1) refers to Section 7, we quote the latter to the extent pertinent:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . .".

(c)

STATEMENT OF THE CASE

The facts are simple and without important conflict.

1.

The Basis of Federal Jurisdiction of the Court Below

The court below had jurisdiction under the provisions of Section 10(f) of the Act.

2.

The Board's Decision

The Board found, sustained by the court below, that petitioner was guilty of unfair labor practice in two respects:

(i) On April 9, 1954, petitioner, some three weeks after the failure of an economic strike, laid off 94 of the maintenance employees. The Board conceded that petitioner's motive in laying off *this number* was wholly economic, but, as to the individual employees laid off, it found that as to 7 out of the 94 petitioner was

> "motivated, not by any legitimate economic interest of its own, but by a desire to punish the 7 complainants for exercising the right guaranteed in Section 7 to engage in concerted activities, and a wish to reward the other employees for abandoning or not participating in the strike,"

thereby violating Sections 8(a)(3) and 8(a)(1) of the Act (PA 38). The effect of the Board's finding was that there were 7 other individual employees whom petitioner should have listed for lay-off instead of these particular 7. *As to the remaining 87 laid off, the Board found no illegal motivation.*

(ii) The Board found bad faith on the part of petitioner in bargaining negotiations commencing April 2, 1954, amounting to refusal to bargain, and thereby a violation of Section 8(a)(5) of the Act.

3.

The Background of the Case

Petitioner was named Mathieson Chemical Corporation at the time of the occurrences involved herein. On August 31, 1954 (subsequent to the alleged unfair practice), it merged with Olin Industries, Inc., and took its present name. The alleged unfair labor practices occurred at its Morgantown, West Virginia, plant.

The Board does not contend that petitioner has any history of anti-union bias or conduct, and nothing in the record suggests it.

Maintenance employees, numbering approximately 234 (PA 20), were members of the Unions in several separate bargaining units under uniform contracts containing a union shop clause (PA 34). The contracts expired February 10, 1954, and were not renewed because of inability of

the parties to agree upon the terms of a new contract after some weeks of negotiation (PA 5, 6, 20-1).

On February 24, 1954, the employees represented by the Unions were called out on strike to enforce their wage demands (PA 6). The production employees, who were represented by District 50 UMWA (RA 4) under a contract not then expiring, did not strike (PA 16-17). The plant did not close.

The strike was a failure. Some of the strikers crossed the picket lines and returned to work before the end of the strike. There is no contention that they returned in connection with any promise of benefit or threat of reprisal from petitioner, or any other form of illegal strike-breaking.

On March 17, the remaining strikers returned to work by direction of the Unions, without any advance notice to petitioner and without any agreement on terms (PA 7-8). *All the strikers, both those who crossed the picket lines and those who returned in a body at the end, were members of the Unions.*

No contract was in effect.

The Board concedes that this was an economic strike and makes no contention of unfair labor practice with respect to it (PA 47).

4.

The Lay-offs

Petitioner, on the basis of a study of its maintenance requirements made before the strike, had concluded to lay off 94 maintenance workers (PA 19). But the strike intervened. Promptly after the strike, petitioner made up the list of the 94 employees to be laid off, treating the employees who had returned to work before the end of the strike (RA 10), as replacements (on the seniority ladder with respect to the order of lay-off) of any employees senior

to them who had remained out until the end. It resulted that all the maintenance employees who were at work at the end of the strike were in a higher seniority group (with respect to the order of lay-off) than those who returned at the end of the strike.

Petitioner proposed union recognition of this replacement seniority status of the strikers who returned before the end of the strike, at a bargaining conference held on April 2, 1954 (PA 25). The spokesman of the Unions unqualifiedly and finally refused to agree to it, saying:

> ". . . the proposal was ridiculous and . . . totally unacceptable . . . He could leave it open indefinitely as far as I was concerned, but *we would never agree to it*" (PA 9).

An impasse having thus been reached (and no contract being in effect), petitioner, on April 9, 1954, laid off the 94 maintenance employees in accordance with their lay-off seniority after giving effect to the replacement seniority of the strikers who had returned before the strike ended.

The result was that 7 employees, out of the 94, were laid off who, but for the replacements, would have retained their jobs. This means that 87 of the laid-off employees had so little seniority that they would still have been laid off even if the replacements had not been made. The other 7 are the complainants in this proceeding. *The 7, who under the Board's holding should have been laid off instead of the complainants, were all among the strikers who had acquired replacement seniority by returning before the end of the strike.*

It is important to note that the 94 employees laid off from the maintenance group *were all members of the Unions*, as were all not laid off.

5.

The Potlatch Case

Petitioner's conduct here in the matter of replacement of economic strikers upon the seniority ladder, was precisely the same as that approved in *National Labor Relations Board* v. *Potlatch Forests, supra.* The *Potlatch* case gave careful consideration to a state of facts almost identical to that here. We shall comment upon that decision hereinafter.

6.

Petitioner's Motivation

The Board found, sustained by the court below, that petitioner's action in making the replacements was not with a view to protection of its interests, but was designed to discourage union membership in violation of Section 8(a)(3) of the Act, and to hinder the employees in their right to engage in concerted activities in violation of Section 8(a)(1) of the Act.

The Board's inference that petitioner's motivation in making the replacements, was in order to discourage union membership and to hinder the employees in their right to engage in concerted activities, is, we believe, unsupported by the record. The testimony shows, on the contrary, that petitioner made the replacements on the seniority ladder in the belief that the returning strikers were entitled to replacement status —

> ". . . *we owed these men an obligation* for as much job security as possible, that if at all possible they should be retained in the work group" (PA 16);

and that, so far as petitioner's interests were concerned, it would be a protective measure to recognize that obligation—

> ". . . my prime responsibility is to keep the plant operating" (PA 16).

The Board admits that its inference as to petitioner's motivation is unsupported by proof —

> "That no member of management admitted as a witness that the respondent (petitioner) acted with the intent of discouraging union membership is not a critical flaw in General Counsel's proof" (PA 64).

7.

The Alleged Refusal to Bargain

When, in the bargaining conference of April 2, 1954, hereinbefore mentioned, petitioner proposed to include recognition of the replacements in the seniority section of the new contracts which it then proposed to the Unions (PA 25), and the Unions refused, neither party would yield. The Board said that petitioner's

> ". . . insistence upon its seniority clause demand satisfies us that throughout the bargaining period involved, its conduct toward the Unions was colored by a bad faith resolve never to come to terms on a written agreement" (PA 39).

As to the "bad faith resolve," petitioner eventually reached agreement upon, and signed, a contract with one of the Unions (PA 76-9).

The Board's finding of bad faith in petitioner's bargaining rests primarily upon its conclusion that the replacements violated Sections 8(a)(3) and 8(a)(1) of the Act. Its view was that petitioner could not in good faith decline to yield on the point of contract recognition of the replacements, because it had no legal right to make the replacements.

Hence, the correctness of the Board's finding of bad faith in bargaining must stand or fall upon the correctness of its view with respect to the legality of the replacements.

The other incidents mentioned by the Board as indicating bad faith in bargaining are trivial, and doubtless would not have been noticed by the Board if standing alone. We deem it unnecessary to state here the facts with respect to them.

(h)

THE ARGUMENT

1.

The Decision of the Ninth Circuit in the Potlatch Case and of the Fourth Circuit in the Present Case Are in Sharp Conflict.

In *Potlatch*, the Ninth Circuit held that replacement of economic strikers with returning strikers with respect to seniority in event of future lay-offs, is permissible. In *Potlatch*, as here, the employer did not inform the strikers that if they would cross the picket lines, they would acquire replacement status, nor did it offer any other inducement to them to return to work. In *Potlatch* the terms of the contract recognition of the replacements, proposed by the employer to the union, were in substance the same as those here. In *Potlatch*, as here, the Union refused to agree and the employer maintained the replacements in effect without agreement. It is perfectly plain that in *Potlatch* the Ninth Circuit dealt with precisely the same primary question as here, and that the respective courts reached opposite conclusions.

The court below treated its present decision as in conflict with *Potlatch*, saying:

> "Olin relies heavily upon the *Potlatch Case, supra,* and there is much in Circuit Judge Orr's opinion that lends support to Olin's contention" (App. p. 6).

The Ninth Circuit was unanimous. In the Fourth, Judge Soper dissented and would have followed *Potlatch.* Thus, of the six judges, four have sustained petitioner's position.

We submit that certiorari should be granted to resolve the conflict.

2.

The Question Presented, Relative to the Right of an Employer to Replace Economic Strikers with Returning Strikers, Should Be Settled by This Court Because It is Important in the Administration of the Act.

The importance of settling, by decision of this Court, the primary question here is apparent, in view of the conflict between the Courts of Appeal. It is a matter of common knowledge that individual strikers frequently cross the picket lines before the end of a strike. The present question may be expected to arise again unless now settled by this Court. Its importance in the administration of the Act seems clear.

3.

The Court Below Erred in Construing the Act as Forbidding the Replacements

(A)

PETITIONER HAD THE RIGHT TO REPLACE THE STRIKERS

That petitioner had the right to replace the strikers, since the strike was economic, is not open to question. That principle was settled by this Court in *National Labor Relations*

Board v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345-6. The court below so recognized (App. p. 5).

The replacements in *Mackay* were new employees, and therefore without previous seniority, but the court below does not question that returning strikers are equally eligible as replacements. Indeed, it could hardly be suggested that while new and inexperienced employees are entitled to the right of replacement, that right is denied to the old and experienced. It necessarily follows that since a returning striker can replace a striker in his entire job, he can *a fortiori* do so on the seniority ladder. Since the strikers' *jobs* were open to replacements, so also were their places on the seniority ladder (which, in the absence of contract, was subject to petitioner's regulations—*Aeronautical Lodge* v. *Campbell*, 337 U. S. 521, 526). The greater includes the less. This proposition also the court below does not question in its decision.

The ground upon which the court below denied the returning strikers the replacement seniority right is a narrow one, namely, that since the returning strikers crossed the picket line without the inducement of a "promise . . . that their employment would be permanent," therefore petitioner was under "no *necessity* for such action to keep its plant in operation" (App. p. 5). The court thus appears to condition petitioner's right to make these replacements upon its being made to appear that petitioner was *unable* to keep its plant in operation without the replacements and, further, that it could obtain them only by communicating to them a "promise" that if they would cross the picket lines, "their employment would be permanent."

With due respect to the court's opinion, we have found no other authority for such a restriction upon the right of replacement. *Mackay* did not so hold. It is there stated that

> ". . . an employer, guilty of no act denounced by the statute, has (not) lost the right to protect and continue his business by supplying places left vacant by strikers" (304 U. S. at p. 345).

It seems sufficiently obvious that an employer might have a number of reasons, with a view to his legitimate business interests, for believing that replacement of economic strikers would aid him to "protect and continue his business," besides the single extremity specified by the court below.

With regard to the requirement imposed by the court below of a "promise" of replacement seniority status in order to induce the replacements to return to work, we respectfully suggest that the court overlooked the fact that such conduct on the part of the petitioner would have constituted illegal strike-breaking and thus a violation of Section 8(a)(1). The authorities to that effect are numerous. In fact, in the present case, the Trial Examiner, whose findings were approved by the Board, found on this very point:

> "Had the Respondent (petitioner) merely *offered* (Board's emphasis) such an inducement to its employees while they were on strike, its act would have been found violative of the Act by the Board, in accordance with its decision in *Dinion Coil Co., Inc.* (110 NLRB No. 27)."

The Trial Examiner could readily have cited many more authorities to the point. In *Medo Photo Supply Corp.* v. *National Labor Relations Board,* 321 U. S. 678, an analogous case, it was said (at p. 684):

> ". . . The statute guarantees to all employees the right to bargain collectively through their chosen representatives. Bargaining carried on by the employer directly with the employees, whether a minority or majority,

> who have not revoked their designation of a bargaining agent, would be subversive of the mode of collective bargaining which the statute has ordained, as the Board, the expert body in this field has found. Such conduct is therefore an interference with the rights guaranteed by Section 7 and a violation of Section 8(1) of the Act."

In *National Labor Relations Board* v. *James Thompson & Co.* (C. A. 2—1953), 208 F. 2d 743, the employer said to one of the strikers (208 F. 2d at p. 748):

> "John, bring them all back and in a week they will all be satisfied."

The Board held that this constituted an offer of an inducement to cross the picket lines and was thereby a violation of Section 8(a)(1). The Second Circuit granted enforcement.

In *National Labor Relations Board* v. *Penokee Veneer Co.* (C. A. 7—1948), 168 F. 2d 868, the employer communicated with the individual strikers for the purpose of ascertaining how many of them would return to work upon the same terms and conditions which had been offered to their bargaining representative and by it refused. No special inducements of any kind were promised to those who might return. The Board found a violation of Section 8(a)(1), upon the ground that

> "respondent sought to by-pass the C.I.O. as exclusive bargaining representative of the strikers and to deal with each striker on an individual basis" (168 F. 2d at p. 870).

The Seventh Circuit, one judge dissenting, refused to enforce, but only upon the ground that "no other or different

terms were mentioned to the employees" than had previously been offered to the bargaining representative, and that the employer had no anti-union background (168 F. 2d at pp. 870-1).

The court below, in connection with its point that petitioner was under "no necessity" to make the replacements, finds significance in the fact that petitioner's policy under which the replacements were made, was not "promulgated" until after the strike was over (App. p. 5). The record does not show when the returning strikers were informed of their replacement seniority status, though it is true that the Unions were not formally notified until the first bargaining conference held after the strike (two weeks after the strike), at which time petitioner submitted to them the hereinbefore mentioned written form of contract recognition of the replacements. But surely the date of "promulgation" is immaterial. After all, the replacements were made when the returning strikers were put to work. The places on the seniority ladder were then open and were then filled. Was not the status then fixed?

In *Potlatch* the Ninth Circuit dealt directly with the points thus raised by the decision of the court below, saying (App. p. 19):

> "While the *Mackay Radio* case can be formally distinguished on the ground that the Supreme Court in that case was considering a shortage of jobs at the time the strike was settled, rather than a shortage caused by a later curtailment of activities, the assurance of permanent employment in the latter event is equally justifiable.
>
> "The record here does not disclose that Potlatch in fact assured the replacements that 'their places might be permanent;' however, that assurance need not be proved. The Supreme Court in the *Mackay Radio* case

> was concerned not so much with an explicit promise of permanent tenure as with the propriety of the employer's concern for that tenure . . . The propriety of this concern was settled in the *Mackay Radio* case."

We submit that the question of the correctness of the restriction imposed by the court below upon the right of replacement ought to be considered by this Court.

(B)

PETITIONER'S ACTIONS WERE NOT WITHIN THE PROHIBITION OF SECTIONS 8(a)(3) AND 8(a)(1)

The court below was dealing with the application of specific statutory prohibitions.

As to the alleged violation of Section 8(a)(3) (discrimination to discourage union membership), we point out that *all the employees involved* were members of the Unions. It is very difficult to see how, in that situation, petitioner's motivation could have been to discourage union membership, or how its actions could have produced that effect. If, instead of the complainants, 7 of the replacements had been laid off (as the Board contended should have been done), the latter would have been union members, too. The effect upon the union membership would thus have still been the same. It does not appear from the record that the Unions lost any members as a result of the alleged violation of Section 8(a)(3), or that the Unions were thereby prevented from obtaining any members.

In *National Labor Relations Board* v. *Del E. Webb Construction Co.* (C. A. 8), 196 F. 2d 702, and in *Texas Co.* v. *National Labor Relations Board* (C. A. 9), 198 F. 2d 540, those courts were dealing with the converse state of facts, in that the employees found by the Board to have been discriminated against were *ineligible to union membership.*

The courts applied the same reasoning outlined above, which seems clearly applicable, and both courts cited *Potlatch* to the point. In the *Webb* case, it was said (196 F. 2d at p. 705-6):

> "The respondent union, prior to the time Pickard joined the apprentice unit, had a seniority rule. This rule gave preference or priority to the veteran operators but those who joined as apprentices accepted this rule and Pickard has never indicated a desire to renounce his union status. It must be borne in mind that he was not eligible to membership in Local 101 and he actively sought such membership prior to the incident here involved. In these circumstances we are unable to see how the discrimination against him as here charged encouraged membership in the respondent union or discouraged membership in Local 101-B. Pickard could scarcely have been encouraged to become a journeyman member of respondent union because under no circumstances could he become such member. His status so far as union affiliations were concerned, was fixed and could not be changed at least by any act of the respondent company. It can scarcely be said that one may effectively be encouraged to do or not to do that which he is incapable of doing.
>
> "So in the instant case, it being impossible for Pickard to become a member of the respondent union, nothing that respondent company might do by way of discriminating against him could be said proximately to encourage him to join a union which it was impossible for him to join. There can be no violation of this statute unless the conduct complained of can have the proximate and predictable effect of encouraging or discouraging membership in a labor organization. N.L.R.B. v. Winona Textile Mills, 8 Cir., 160 F. 2d 201; N.L.R.B. v. Potlatch Forests, 9 Cir. 189 F. 2d 82; Western Cartridge Co. v. N.L.R.B., 7 Cir. 139 F. 2d 855."

In the *Texas Company* case, the complainant was a super-

visory employee and, as such, not a union member. It was said (198 F. 2d at p. 544):

> "We turn to the Board's holding that by declining to reemploy Cody for nonsupervisory work the petitioner violated Sec. 8(a)(3) of the Act. Its basic finding in support of this ruling is that petitioner's refusal 'necessarily discouraged membership' in the labor organization involved. As already indicated, the Board agreed that Sec. 2(3) of the Act privileged Cody's discharge, and that the petitioner refused to employ him for the conduct which occasioned the discharge. It did not hold that petitioner's refusal was motivated by a purpose to interfere with or discourage union activity by rank-and-file employees. It would seem clearly to follow, as the minority of the Board pointed out, that if any discouragement of union membership were occasioned, it would be incidental and permissible under the Act. N.L.R.B. v. Potlatch Forests, 9 Cir., 189 F. 2d 82, 85, 86; Panaderia Sucesion Alonso. Note 8, supra."

We therefore submit that when the language of Section 8(a)(3) is considered, the facts with respect to petitioner's actions do not fall within the prohibition of the statute.

As to the alleged violation of Section 8(a)(1) (interference with the right to engage in concerted activities, *i.e.*, here, to strike), the court below bases its approval of the Board's findings upon the following (App. pp. 5-6):

> "Olin was clearly penalizing the strikers for exercising their right to strike and was thereby clearly *discouraging* (N.B.—the statutory words are 'interfere with, restrain, or coerce', and do not include 'discourage') any exercise of this right *in the future.*"

We think that the court below, in reaching this conclusion, must have overlooked the fact that the replacements did not concern a *future* strike in any way, but only the strike which ended March 17, 1954. The fact was that the respective

seniority status was fixed automatically when the remaining strikers returned in a body on March 17, 1954. Employees then at work were in the first list; those then returning were in the second. *That was the determinative date,* and the rights of any *future* strikers, in any future strike, could not in any way be affected thereby.

Even if it be conceded (for the sake of argument only), that the replacements so made by petitioner might be expected to "interfere with, restrain or coerce" petitioner's employees in respect of the exercise of their right to engage in a *future* strike, it seems clear that such a factor would reasonably be wholly lost and dissipated in the far greater and more far-reaching effect resulting from *the loss of the strike,* in which the strikers lost three weeks' time and failed of any gains.

In *Potlatch,* the court considered any incidental effects of the replacements with respect to future strikes, and reached the conclusion that no violation of Section 8(a)(1) was involved, saying (App. pp. 16-7):

> ". . . Potlatch has exhibited no anti-union prejudices, and in making the selection has provided that all of the individuals in the returning group retain full seniority rights as between themselves.
>
> "There has been no discrimination between union and non-union employees on the basis of union membership, as in the case of National Labor Relations Board v. Waterman S. S. Corp., 1940, 309 U. S. 206, 60 S. Ct. 493, 84 L. ed. 704. The group of replacements includes union members, some of whom had been out on strike but had returned to their jobs before the strike was settled. The sole 'discrimination' charged is between the replacements and those strikers who returned to work after the strike was settled. As between these two groups, no 'discrimination' is charged with regard to rates of pay, promotions, etc., The sole 'discrimination' charged is said to be found in the 'strike seniority'

policy, by which the strikers returning after the settlement of the strike are laid off before the replacements, in the event of an economic curtailment. . . .

"(3) Unlike the usual case, the unfair labor practice charged here is the adoption of a general policy applicable to all employees, rather than isolated acts of discrimination. Presumably, the Board impliedly found that the true purpose motivating Potlatch's adoption of the 'strike seniority' policy was a desire to penalize those members of the Union who had most persistently asserted the Union's demands. The only evidence to support such a finding is the conclusion that Potlatch must have realized the inevitable consequences of the policy. Such a conclusion is not enough to support the finding of a discriminatory motive where the conduct complained of is consistent with the legitimate exercise of the employer's 'right to protect and continue his business by supplying places left vacant by strikers.' National Labor Relations Board v. Mackay Radio & Telegraph Co., 1938, 304 U. S. 333, 345, 58 S. Ct. 904, 911, 82 L. Ed. 1381."

We submit that when the language of Section 8(a)(1) is considered, the conclusion of the court below that petitioner's actions "discouraged" the exercise of the right to strike "in the future," and thereby constituted a violation of Section 8(a)(1), ought to be reviewed by this court by certiorari.

Respectfully submitted,

WM. A. STUART
188 East Main Street
Abingdon, Virginia
Counsel of Record
for Petitioner

H. W. STULL, *Labor Counsel*
Olin Mathieson Chemical Corporation
460 Park Avenue
New York 22, New York
Of Counsel

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7127

OLIN MATHIESON CHEMICAL CORPORATION,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

(Argued March 20, 1956. Decided April 9, 1956)

Before Parker, Chief Judge, and Soper and Dobie, Circuit Judges.

William A. Stuart and H. W. Stull for Petitioner; and Owsley Vose, Attorney, National Labor Relations Board, (Theophil C. Kammholz, General Counsel; David P. Findling, Associate General Counsel; Marcel Mallet-Prevost, Assistant General Counsel, and Nancy M. Sherman, Attorney, National Labor Relations Board, on brief) for Respondent.

DOBIE, Circuit Judge:

This case is before us upon the petition of the Olin Mathieson Chemical Corporation (hereinafter called Olin)

to review and set aside an order of the National Labor Relations Board (hereinafter called the Board) issued against petitioner and Mathieson Chemical Corporation, its predecessor in interest, on October 18, 1955, following the usual proceedings under Sections 9 and 10 of the National Labor Relations Act (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*) (hereinafter called the Act). In its answer to the petition, the Board has requested enforcement of its order.

The Board's order required Olin to cease and desist from the unfair labor practices found, or from in any other manner interfering with, restraining, or coercing its employees in the exercise of their statutory rights. Affirmatively, Olin was required to reinstate the unlawfully laid-off employees and make them whole for any loss of pay they may have suffered as a result of the discrimination against them; to rescind its discriminatory seniority policy and to restore all employees affected thereby to the seniority they would have enjoyed absent such discriminatory policy; upon request, to bargain with the Unions with respect to the units of which they are the respective certified representatives; and to post appropriate notices.

Two questions are presented to us:

(1) Whether the Board properly found that the Company violated Section 8(a)(3) and (1) of the Act by changing its seniority policy after a strike to give preference to nonstrikers and to employees who had returned to work during the strike, and by laying off seven employees pursuant to its new policy.

(2) Whether the Board properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively in good faith with the Unions.

The Board found, in agreement with the Trial Examiner,

that Olin changed its seniority policy after the strike so as to give preference to employees who had worked during the strike in order to discipline employees adhering to the strike until the very end and that Olin's action in this regard, and its further action, pursuant to its new policy, in laying off seven employees who would not have been laid off under Olin's former seniority policy, was violative of Section 8(a)(3) and (1) of the Act. The Board further found, upon the basis of the entire course of the bargaining, and particularly, in view of the Company's insistence upon superseniority for nonstrikers or returning strikers, that the Company, therefore, had refused to bargain collectively in good faith in violation of section 8(a)(5) and (1) of the Act.

In 1952, the Unions were certified by the Board as the bargaining representatives of the employees. Thereafter, Olin entered into collective bargaining agreements with the Unions, which were to expire February 10, 1954. No new agreements were effected before the strike on February 24, 1954.

We think we must uphold these findings of the Board, that we must deny Olin's petition to set aside the order of the Board, and that the Board's petition to enforce its order must be granted.

Section 8(a)(3) of the Act forbids an employer by discrimination in regard to hire and tenure of employment to discourage membership in any labor organization. The protection of Section 8(a)(3) extends to "all elements of the employment relationship which in fact customarily attend employment and with respect to which an employer's discrimination may as readily be the means of interfering with employees' right of self-organization as if these elements were precise terms of a written contract of employment." *National Labor Relations Board* v. *Waterman Steamship*

Corp., 309 U. S. 206, 218. Moreover, Olin's superseniority policy is in conflict with Section 13 of the Act, providing that "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike. . ." 29 U. S. C. Sec. 163. As was said in the *per curiam* opinion in *Republic Steel Corporation* v. *National Labor Relations Board*, 114 F. (2d) 820, 821: "We think it was the intention of the Board, as it was of this court, to provide that upon reinstatement the striking employees were to be treated in all matters involving seniority and continuity of employment as though they had not been absent from work." See, also, *National Labor Relations Board* v. *Industrial Cotton Mills*, 208 F. (2d) 87, cert. denied 347 U. S. 935, *Home Beneficial Life Insurance Co.* v. *National Labor Relations Board*, 159 F. (2d) 280, cert. den. 332 U. S. 758.

Olin does not dispute the fact that the promulgation and implementation of its superseniority policy was discriminatory in favor of employees abandoning or not participating in the strike and against those remaining on strike until it was called off. Nor does Olin deny that its action discouraged union activities. Olin's contention is twofold. First, relying on the Mackay Radio decision of the Supreme Court, *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, Olin contends that it was permissible, as a measure necessary to "protect and continue" its business, for it to replace the strikers with new employees, and hence it was proper (since the greater includes the less) for it to take the not so drastic action of depriving the strikers of seniority for layoff purposes in order to accomplish this same objective. Second, Olin contends that its conduct is sanctioned by the decision of the Ninth Circuit in the case of *National Labor Relations Board* v. *Potlatch Forests, Inc.*, 189 F. (2d) 82.

The Mackay decision merely holds that an employer need not displace employees hired during an economic strike to make room for returning strikers, and, in the opinion in that case, Mr. Justice Roberts went on to say (304 U. S. at pages 345-346):

> "Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on the business. Although § 13 provides, 'Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike,' it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled."

But the situation before us is quite different. The strike was over, the strikers had returned to work. The Olin plant was in full operation. No promise, when they were employed, was made to the employees who remained at work during the strike, or who returned to work before the end of the strike, that their employment would be permanent. Olin, after the strike, when there was no necessity for such action to keep its plant in operation, promulgated its superseniority policy in favor of the so-called "loyal employees" and against those who returned to work after the strike had failed and was over. Olin was clearly penalizing the strikers

for exercising their right to strike and was thereby clearly discouraging any exercise of this right in the future. This, we think, Olin cannot lawfully do. Olin's attorney, Stull, admitted in one of the conferences with Union representatives that Olin's insistence on the superseniority plan was motivated by Olin's preference for the employees who had been loyal to Olin by helping to break the strike, and also Olin's concern that the plant be not "shut down again."

The 7 employees unlawfully discharged were part of some 94 maintenance men laid off pursuant to Olin's new policy. These 7 had not worked during the strike but they had been hired by Olin prior to a corresponding number of retained employees who had worked during the strike.

It is quite obvious that Olin's application of the superseniority policy here tended to discourage future strikes. Said Mr. Justice Reed, in *Radio Officers' Union* v. *National Labor Relations Board*, 347 U. S. 17, 45: "Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement."

Olin relies heavily upon the Potlatch case, *supra*, and there is much in Circuit Judge Orr's opinion that lends support to Olin's contention. The only important factual difference between Potlatch and our case seems to be "Potlatch advocated 'strike seniority' before the strike was settled, adopted that policy at the time of settlement and has consistently maintained that policy at all times thereafter." 189 F. (2d) at page 86. There was also doubt expressed in Judge Orr's opinion as to the motivation in applying the superseniority clause. Said Judge Orr (189 F. (2d) at page 86): "In the instant case, therefore, the 'discrimination' between replacements and strikers is not an unfair labor practice despite a tendency to discourage union activities, because the benefit

conferred upon the replacements is a benefit reasonably appropriate for the employer to confer in attempting 'to protect and continue his business by supplying places left vacant by strikers.' " In our case, the replacements seem all to have been old employees; in Potlatch, the replacements included both old and new employees.

From Judge Orr's opinion, we quote further (189 F. (2d) at page 86):

> "The record here does not disclose that Potlatch in fact assured the replacements that 'their places might be permanent'; however, that assurance need not be proved. The Supreme Court in the Mackay Radio case was concerned not so much with an explicit promise of permanent tenure as with the propriety of the employer's concern for that tenure."

With this, we disagree. With a strike in progress, the primary concern of the employer is to keep his plant in operation. It is then proper for an employer, who might be unable to procure replacements save upon a promise of permanent tenure, to promise such tenure to the replacements. But when the strike is over, when the plant is in operation, then the imposition of the superseniority policy in favor of the replacements and against the strikers is quite a different matter. That is the case before us. There is nothing in the record here to show that, at the time Olin secured these replacements for the strikers, Olin made any promise of permanent tenure to these replacements. And we do not read the Mackay case as condoning this conduct on the part of Olin.

When it became apparent to the Unions that the strike was lost, they sought to resume negotiations with Olin. Olin's response was that they should make their proposals

through the Federal Mediation and Conciliation Service. Finally, after delaying answering the Union's letter of March 23 formally requesting a bargaining meeting, Olin arranged a meeting on April 2. At this meeting Olin, while offering to sign contracts with the Unions containing all provisions previously agreed to, demanded that the Unions agree to the incorporation in the seniority clause of the superseniority policy adopted after the strike. Despite the Union's objection to this proposal, Olin a few days later nevertheless, and without further consultation with the Unions, effected a layoff in accordance with this policy.

Olin shortly thereafter refused to meet with the Unions, stating that if the Unions had any proposals to make they should be submitted in writing. When the Unions subsequently submitted such proposals in writing, including a decreased wage demand, Olin rejected them, stated that it would not recede from its superseniority policy or from its refusal to grant a wage increase, and refused to meet further with the Unions on the ground that such action would be "futile."

The parties again met about ten months later, and although they were in agreement on all other issues, Olin still insisted on the incorporation of its superseniority policy in the contract. Although the Unions argued that this clause was illegal and that the decision on this issue should be held in abeyance until the Board had had a chance to pass on the question—and even offered to amend the proposed agreement to include this provision if the Board upheld its legality —Olin nevertheless persisted in its demand for the inclusion of this provision in the agreement.

On these facts we must uphold the Board's finding that Olin violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively in good faith with the Unions.

It seems only fair to state that the record shows no past background of hostility towards the Unions on the part of Olin. Nor was there here any discrimination between employees who did belong to the Unions and those who did not; for all the employees involved were Union men.

For the reasons stated, we must decree enforcement of the Board's order requiring Olin to reinstate the employees unlawfully laid off under the superseniority policy and to make them whole for any loss of pay suffered; to rescind its discriminatory policy; to bargain collectively in good faith with the Unions; and to post appropriate notices.

Order of the Board enforced.

SOPER, Circuit Judge, dissenting:

The opinion of the court is in direct conflict with that of the Ninth Circuit in *N. L. R. B.* v. *Potlatch Forests,* 189 F. 2d 82, which is not distinguishable in any essential feature, and presents in my opinion a reasonable approach to the problem under consideration. I base this dissent on the following passage from that opinion (p. 86):

> "In the instant case, therefore, the 'discrimination' between replacements and strikers is not an unfair labor practice despite a tendency to discourage union activities, because the benefit conferred upon the replacements is a benefit reasonably appropriate for the employer to confer in attempting 'to protect and continue his business by supplying places left vacant by strikers.' Hence, we think the specific question posed here has been answered by the Supreme Court by recognizing that an employer attempting to fill a number of positions must be able to offer a substantial degree of se-

curity (as well as attractive wages), and that an employer may properly assure the replacements that 'their places might be permanent.' If there are not enough jobs to go around at the time the strike is settled the rights of replacements prevail over strikers.

While the Mackay Radio case (304 U. S. 333) can be formally distinguished on the ground that the Supreme Court in that case was considering a shortage of jobs at the time the strike was settled, rather than a shortage caused by a later curtailment of activities, the assurance of permanent employment in the latter event is equally justifiable."

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12532

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

POTLATCH FORESTS, INCORPORATED,
Respondent

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

(Decided May 11, 1951 Rehearing denied July 6, 1951)

Before Orr and Pope, Circuit Judges, and Fee, District Judge.

Robert N. Denham, Gen. Counsel, David P. Findling, Associate Gen. Counsel, A. Norman Somers, Asst. Gen. Counsel, Fannie M. Boyls, Albert M. Dreyer, Maurice Alexandre, Attorneys, N.L.R.B., Washington, D. C., for petitioner.

R. N. Elder, Robt. H. Elder, Sidney E. Smith, Coeur d'Alene, Idaho, George W. Beardmore, Lewiston, Idaho, for respondent.

ORR, Circuit Judge.

National Labor Relations Board seeks enforcement of its order requiring respondent Potlatch Forests to cease and

desist from maintaining the "strike seniority" policy, hereinafter described, on the ground that said policy discriminates against union members in violation of Sec. 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C.A. §158(a)(3).

In 1944 the International Woodworkers of America was certified, and has since been recognized, as the exclusive bargaining agent for Potlatch's production and maintenance employees in its various establishments in Idaho. On April 1, 1946 Potlatch and the Union (the I.W.A. and its four locals) executed a Master Working Agreement, to expire at the end of one year, providing inter alia for seniority rights to govern in case of a reduction in force. Negotiations to renew this agreement in the spring of 1947 were disrupted over the question of wage differentials. An agreement extending all other provisions of the 1946 agreement until April 1, 1948, was executed, leaving the disputed question for further negotiations.

The parties being unable to agree, the Union called a strike in August 1947, thereby causing a shutdown of all the operations of Potlatch. Near the end of August 1947 Potlatch managed to resume operations, gradually accumulating both new employees and former employees who crossed the picket lines. The strike was later terminated and this group (hereinafter termed the "replacements") numbered about 1750 out of a normal complement in the bargaining unit of about 2600.

On October 10, 1947, the strike being hopelessly lost, the Union initiated negotiations to settle it. In the course of settlement negotiations, Potlatch vigorously asserted its desire to protect the job security of the replacements, as against possible displacement by those who would return on termination of the strike. The Union, on the other hand, desired that the seniority rights of this latter group (hereinafter

called the "strikers") be fully protected. An agreement was reached and the strike terminated on October 13, 1947.

Immediately thereafter (apparently on October 14), Potlatch drafted in writing the "strike seniority" policy which gave rise to these proceedings. Under this policy, the strikers (those who returned to work on or after October 13) were to be laid off ahead of the replacements (those new or former employees who were working on or before October 12), in case a reduction in force should become necessary by reason of a curtailment of Potlatch's activities. While this draft was not publicized at that time, the Board has stipulated that Potlatch has maintained the "strike seniority" policy without deviation since October 13, 1947.

In the spring of 1948 Potlatch and the Union undertook negotiations to renew their agreement and consolidate all prior agreements into one master agreement. They apparently reached an agreement, and initialed a memorandum to that effect. However, when the proposed master agreement was prepared by Potlatch and submitted to the Union for signature, the Union representatives refused to sign on the ground that a provision purporting to incorporate the "strike seniority" policy had not been agreed upon, or discussed, in the negotiations. Hence, the 1948 master agreement never became effective, but the parties continued to operate under previous understandings.

Meanwhile, Potlatch continued to maintain the "strike seniority" policy. We have no knowledge as to the exact time this policy was in fact applied to an individual case. The Board bases its petition not only on the maintenance of this general policy but also to its application in the case of two individuals, Cloninger and Walters, on December 30, 1948 and January 18, 1949. Both of these men were strikers who had remained out until the strike was terminated, and both were "bumped" by workers with inferior seniority

rights, as measured on the pre-strike basis. Cloninger filed a grievance, which was carried by the Union to the highest authority provided for in the grievance procedure, short of conciliation. At that point, the grievance was settled and the Union agreed that Cloninger be put back to work under the "strike seniority" policy, but expressly noted that the Union was not agreeing to the general validity of that policy. Walters filed no grievance.

On February 16, 1949, a charge was filed by the International Woodworkers of America, Local 10-364, signed by the vice-president of the International. This charge, as later amended, alleged that Potlatch violated Sec. 8(a)(1) and (3) of the Act, in maintaining and giving effect to the "strike seniority" policy. At the hearing before the Trial Examiner, the general counsel conceded that Sec. 8(a)(1) was involved only to the extent that the alleged violation of Sec. 8(a)(3) would itself constitute a violation of the broader Sec. 8(a)(1), there being no issue of an independent interference with the rights of employees guaranteed by Sec. 7. The Board held that Potlatch's conduct violated Sec. 8(a)(3), which provides that it "shall be an unfair labor practice for an employer * * * by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *." The Board ordered Potlatch to cease and desist from maintaining or giving effect to the "strike seniority" policy and to post the customary notices. 87 N.L.R.B. 1193. The Board made no order relative to reinstatement of Cloninger and Walters, as they had already returned to work. No back pay was ordered for the reason that no claim was made in one case and was not justified in the other.

[1] The Act does not confer upon Cloninger and Walters, nor upon the other strikers, specific seniority rights of which

it is alleged they are being deprived; the Act merely prohibits discrimination in establishing and applying seniority policies. Seniority rights generally derive their scope and significance from union contracts. Aeronautical Industrial Lodge v. Campbell, 1949, 337 U. S. 521, 526, 69 S. Ct. 1287, 93 L. Ed. 1513. The Board found that Potlatch in 1947 agreed to, and has at all times since been bound by, contractual provisions conferring upon the strikers seniority rights of which they are being deprived by the application of the strike seniority policy. This finding was made despite Potlatch's contentions that the Union in 1947 agreed to, and has at all times since been bound by, the strike seniority policy.

Contrary to the significance given the various agreements by the Board, we deem it unnecessary to consider the validity of the Board's finding because a charge that the maintenance by Potlatch of the "strike seniority" policy constitutes a breach of a collective bargaining agreement should properly have been brought under Sec. 8(a)(1) or (5). That the charge in this case is confined to Sec. 8(a)(3) was conceded by counsel for the Board at the hearing before the Trial Examiner. (Record p. 88) Sec. 8(a)(3) prohibits *discrimination*, not breach of contract. So far as Sec. 8(a)(3) is concerned, Potlatch may adopt any rule of seniority it desires—whether or not that rule violates an existing agreement—so long as that rule does not discourage union membership by discrimination. Cf., Kansas City Power & Light Co. v. National Labor Relations Board, 8 Cir., 1940, 111 F. 2d 340, 351-353. Hence, the sole question for determination is whether the acts charged constitute discrimination under Sec. 8(a)(3).

[2] In considering this question, it must be recognized at the outset that this case concerns what is generally termed an "economic strike," rather than an "unfair labor practice

strike." If this strike had resulted from an unfair labor practice of Potlatch, proceedings to remedy that unfair labor practice, if not barred by the limitations of Sec. 10(b), could properly culminate in an order of reinstatement with full seniority rights, if the Board concluded that that remedy was appropriate to wipe out the effects of the prior unfair labor practice. Cf., Republic Steel Corp. v. National Labor Relations Board, 3 Cir. 1940, 114 F. 2d 820.

In this case the Board, being concerned with a simple "economic strike," in order to sustain an unfair labor practice must hold that the maintenance of the "strike seniority" policy, in and of itself constitutes an unfair labor practice. The Board cites Republic Steel Corp. v. National Labor Relations Board, supra; Polish National Alliance v. National Labor Relations Board, 7 Cir. 1943, 136 F. 2d 175; National Labor Relations Board v. Star Pub. Co., 9 Cir., 1938, 97 F. 2d 465. We do not consider those cases controlling because of the nature of the strike.

Also, cases dealing with a discriminatory selection, among the returning strikers, of those individuals to be reinstated to fill the vacancies remaining when the strike is terminated, such as, National Labor Relations Board v. Mackay Radio & Telegraph Co., 1938, 304 U. S. 333, 346, 58 S. Ct. 904, 82 L. Ed. 1381; National Labor Relations Board v. Sandy Hill Iron & Brass Works, 2 Cir. 1947, 165 F. 2d 660; cf., National Labor Relations Board v. Walt Disney Productions, 9 Cir., 1944, 146 F. 2d 44, have no application. Potlatch has exhibited no anti-union prejudices, and in making the selection has provided that all of the individuals in the returning group retain full seniority rights as between themselves.

There has been no discrimination between union and non-union employees on the basis of union membership, as in the case of National Labor Relations Board v. Waterman S.S.

Corp., 1940, 309 U. S. 206, 60 S. Ct. 493, 84 L. Ed. 704. The group of replacements includes union members, some of whom had been out on strike but had returned to their jobs before the strike was settled. The sole "discrimination" charged is between the replacements and those strikers who returned to work after the strike was settled. As between these two groups, no "discrimination" is charged with regard to rates of pay, promotions, etc. The sole "discrimination" charged is said to be found in the "strike seniority" policy, by which the strikers returning after the settlement of the strike are laid off before the replacements, in the event of an economic curtailment.

Failure of an employer to maintain previous seniority rights for returning strikers may be said to discourage union membership, but many acts of an employer which seem to come within the language of Sec. 8(a)(3) are nevertheless permissible if they are done for a legitimate business purpose. "The act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion. The *true purpose* is the subject of investigation with full opportunity to show the facts." National Labor Relations Board v. Jones & Laughlin Steel Corp., 1937, 301 U. S. 1, 45-46, 57 S. Ct. 615, 628, 81 L. Ed. 893. (Emphasis supplied.)

[3] Unlike the usual case, the unfair labor practice charged here is the adoption of a general policy applicable to all employees, rather than isolated acts of discrimination. Presumably, the Board impliedly found that the true purpose mo-

tivating Potlatch's adoption of the "strike seniority" policy was a desire to penalize those members of the Union who had most persistently asserted the Union's demands. The only evidence to support such a finding is the conclusion that Potlatch must have realized the inevitable consequences of the policy. Such a conclusion is not enough to support the finding of a discriminatory motive where the conduct complained of is consistent with the legitimate exercise of the employer's "right to protect and continue his business by supplying places left vacant by strikers." National Labor Relations Board v. Mackay Radio & Telegraph Co., 1938, 304 U. S. 333, 345, 58 S. Ct. 904, 911, 82 L. Ed. 1381. While the employer may know that hiring replacements tends to dissipate the effects of the strike, and thereby tends to discourage union activities, such conduct is regarded as a legitimate weapon of economic warfare. Reasonable "discrimination" in the exercise of this right is justified by the employer's legitimate interest. He "is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by (the employer) to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice, nor was it such to reinstate only so many of the strikers as there were vacant places to be filled." National Labor Relations Board v. Mackay Radio & Telegraph Co., supra, 304 U. S. at page 345-346, 58 S. Ct. at page 911.

[4] In the instant case, therefore, the "discrimination" between replacements and strikers is not an unfair labor practice despite a tendency to discourage union activities, because the benefit conferred upon the replacements is a benefit reasonably appropriate for the employer to confer

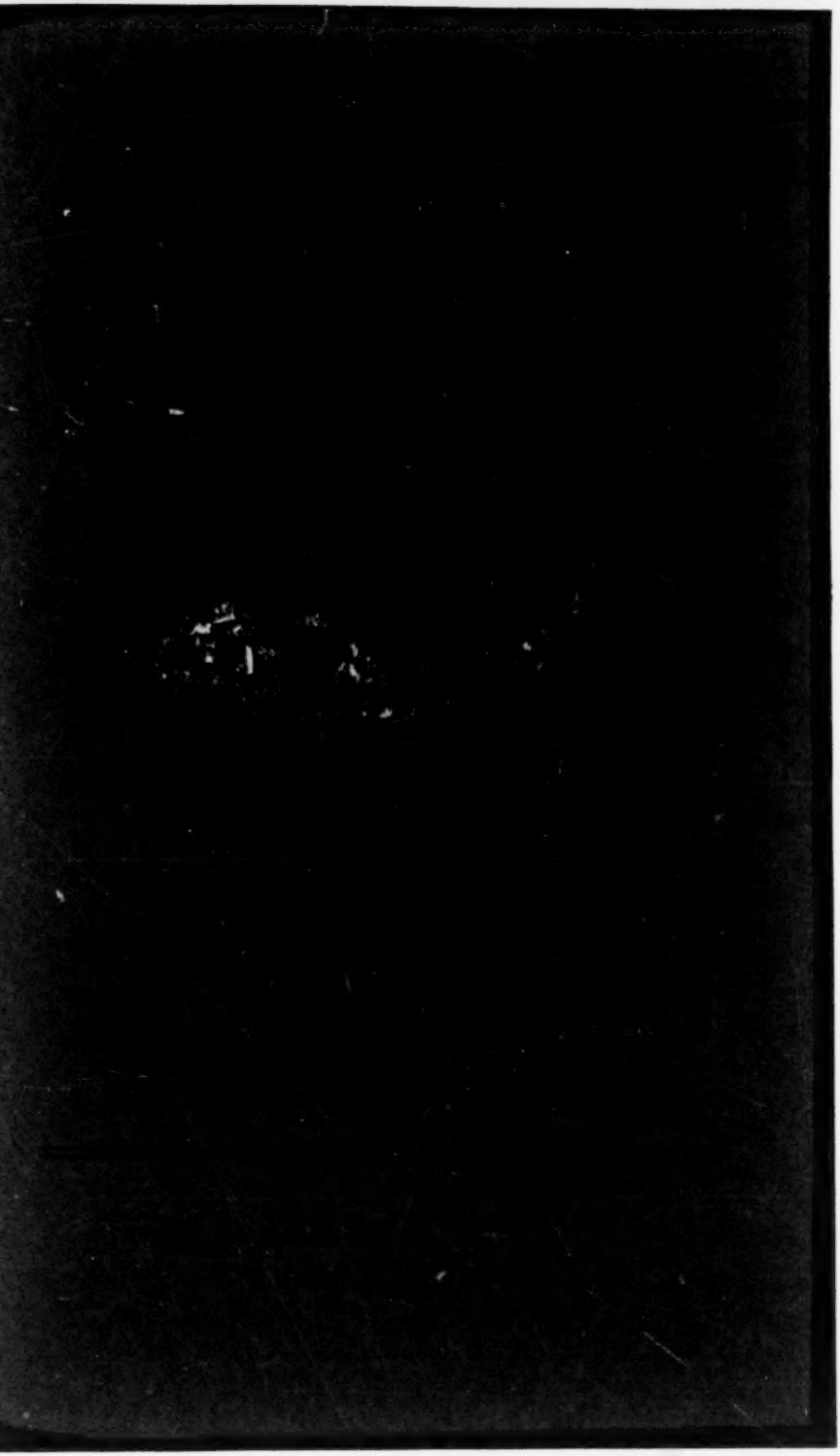
in attempting "to protect and continue his business by supplying places left vacant by strikers." Hence, we think the specific question posed here has been answered by the Supreme Court by recognizing that an employer attempting to fill a number of positions must be able to offer a substantial degree of security (as well as attractive wages), and that an employer may properly assure the replacements that "their places might be permanent." If there are not enough jobs to go around at the time the strike is settled the rights of replacements prevail over strikers.

While the Mackay Radio case can be formally distinguished on the ground that the Supreme Court in that case was considering a shortage of jobs at the time the strike was settled, rather than a shortage caused by a later curtailment of activities, the assurance of permanent employment in the latter event is equally justifiable.

The record here does not disclose that Potlatch in fact assured the replacements that "their places might be permanent"; however, that assurance need not be proved. The Supreme Court in the Mackay Radio case was concerned not so much with an explicit promise of permanent tenure as with the propriety of the employer's concern for that tenure. In this case Potlatch advocated "strike seniority" before the strike was settled, adopted that policy at the time of settlement and has consistently maintained that policy at all times thereafter. Potlatch has, since prior to the settlement of the strike, endeavored to make the places of the replacements as nearly permanent as may be. The propriety of this concern was settled in the Mackay Radio case.

Having concluded that the Board erred in holding that Potlatch committed an unfair labor practice makes it unnecessary to consider other questions presented.

Petition denied.



INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	8
Conclusion	11

CITATIONS

Cases:

Associated Press v. *National Labor Relations Board*, 301 U. S. 103 — 8

Black v. *Cutter Laboratories*, No. 92, October Term, 1955 — 9

National Labor Relations Board v. *Gaynor News Company*, 197 F. 2d 719, affirmed, 347 U. S. 17 — 10

National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 — 8

National Labor Relations Board v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333 — 7, 8

National Labor Relations Board v. *Potlatch Forests, Inc.*, 189 F. 2d 82 — 7, 8, 9

National Labor Relations Board v. *Stowe Spinning Company*, 336 U. S. 226 — 8

Radio Officers' Union v. *National Labor Relations Board*, 347 U. S. 17 — 8, 10

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*):

Section 2 (3) — 2, 9

Section 7 — 4

Section 8 (a) (1) — 4, 6

Section 8 (a) (3) — 4, 9

Section 8 (a) (5) — 6

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 153

OLIN MATHIESON CHEMICAL CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. pp. 1–13) is not yet reported. The findings of fact, conclusions of law, and order of the Board (P. A. 36–76) are reported at 114 N. L. R. B. No. 85.

JURISDICTION

The decree of the court below was entered on April 9, 1956 (Pet. App. 1). The petition for a writ of certiorari was filed on June 9, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Board properly found that petitioner violated Section 8 (a) (3) and (1) of the Act by discriminatorily reducing the seniority of reinstated economic strikers as a penalty for striking.

2. Whether substantial evidence supports the Board's finding that petitioner violated Section 8 (a) (5) and (1) of the Act by refusing to bargain in good faith with the unions representing its employees.

STATUTE INVOLVED

Section 2 (3) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151 *et seq.*), provides:

Sec. 2. When used in this Act—

* * * * *

> (3) The term "employee" shall include * * * any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute * * *.

Other pertinent provisions of the Act are set forth in the Petition, pp. 4–5.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT, CONCLUSIONS, AND ORDER

1. PETITIONER'S DISCRIMINATION AGAINST STRIKERS

From February 24 to March 17, 1954, a number of petitioner's 234 maintenance employees engaged in an economic strike to support the position of their bar-

gaining representatives[1] in contract negotiation (P. A. 46–47; 4–7, 20).[2] Although petitioner hired no new employees, its plant continued to operate with a work force of employees who remained at work and strikers who returned to work of their own accord during the course of the strike (P. A. 51, n. 5, 61, 63; 16, R. A. 22, R. 129). When the Unions called off the strike on March 17, petitioner reinstated the remaining strikers (P. A. 48; R. 50–51). Thereafter, at an April 2 bargaining session with the Unions, petitioner for the first time proposed a superseniority clause under which the full term strikers would automatically be junior in seniority to employees who had abandoned or not participated in the strike and further announced an imminent layoff of 94 maintenance men to be selected accordingly (P. A. 50; 8–10, 25, R. A. 10, R. 60, 98–99, 105–106). Among the employees laid off on April 9 were seven erstwhile strikers who, aside from the strike, were senior in point of service to a number of retained employees (P. A. 50–51; 2–3). The layoff of these seven was inconsistent with the seniority provisions in expired

[1] The maintenance employees were represented by three unions: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fittings Industry of the United States and Canada, Local 152, AFL; United Brotherhood of Carpenters and Joiners of America, Local 1369, AFL; and International Brotherhood of Electrical Workers, Local 425, AFL (herein collectively called the Unions).

[2] References to petitioner's appendix are designated "P. A."; to the Board's appendix "R. A."; and to the typewritten transcript "R." References to the General Counsel's Exhibits are designated "G. C. Ex."; and to petitioner's exhibits "Co. Ex."

contracts with the Unions and with petitioner's practice in laying off production employees (P. A. 46, 51; 2–3, G. C. Ex. 5, 6, 7, R. A. 4). In explanation for changing its seniority policy after the strike, petitioner stated it "felt that the ones that come across the picket line * * * deserved a little * * * something for helping support the breaking [of] the strike" and that, in view of their "loyalty to the job" and petitioner's concern that the plant not "shut down * * * again," it "owed these men an obligation for as much job security as possible" (R. A. 61–62; 16, R. A. 8, 22, R. 29).

The Board found (P. A. 37–38, 61–65) that petitioner, in promulgating and implementing the super-seniority policy after the strike, was "motivated, not by any legitimate economic interest of its own, but by a desire to punish the complainants for exercising the right guaranteed in Section 7 to engage in concerted activities, and a wish to reward the other employees for abandoning or not participating in the strike," and that its conduct was accordingly violative of Section 8 (a) (3) and (1) of the Act.

2. PETITIONER'S REFUSAL TO BARGAIN IN GOOD FAITH

When the strike interrupted contract negotiations on February 24, 1954, petitioner and the Unions had reached agreement on many issues, but others, including wage rates, remained unsettled (P. A. 47; 5, R. 92–93, 41–45). Thereafter, on March 15, 23, and 29, the Unions requested a resumption of negotiations (P. A. 48–50; 23–24; R. A. 3, G. C. Ex. 13, R. 52, 54). After first replying that the Unions should make their

proposals through the Federal Mediation and Conciliation Service, petitioner finally agreed to meet on April 2 (P. A. 48, 50; R. A. 3, 54–55). At this meeting petitioner offered to sign contracts containing all provisions previously agreed to if the Unions would agree to the superseniority policy adopted after the strike (P. A. 50; 8–9, 25, R. A. 10, R. 60). Despite the Unions' vigorous objections to the proposal, petitioner a few days later, without further consultation with the Unions, effected a layoff in accordance with this policy (P. A. 50–51; 2–3, 9, R. 99). Petitioner shortly thereafter refused to meet with the Unions, stating that if the Unions had any proposals to make they should be submitted in writing (P. A. 51; R. 59). When the Unions subsequently submitted such proposals in writing, petitioner rejected them, stated that it would not recede from its superseniority policy or from its refusal to grant a wage increase, and refused to meet further with the Unions on the ground that this would be "futile" (P. A. 51–52; 26–27, R. A. 15, R. 59, 60, G. C. Ex. 16). The parties again met about ten months later, after the Unions had filed unfair labor practice charges, and although they were in agreement on all other issues, petitioner still insisted upon incorporating its superseniority policy in the contract (P. A. 53, 54; 11, R. A. 4–5, 22, R. 61, 71–77, 129, 137, 145–148, Co. Ex. 4). Rejecting the Unions' argument that the clause was illegal, and their suggestions that the decision on this issue should be held in abeyance until the Board had passed on the question, or that the proposed agreement be amended to include this provision only if the Board upheld its legality, peti-

tioner persisted in its demand for immediate inclusion of the superseniority provision (P. A. 55–58; 30–31, R. A. 17–21, R. 66, 69, 70, 83, G. C. Ex. 24, 25, 26).

Upon the basis of the entire course of the bargaining, and particularly in view of petitioner's insistence upon discriminatory superseniority for nonstrikers and returning strikers, the Board found that petitioner's "conduct towards the Unions was colored by a bad faith resolve never to come to terms on a written agreement," and that petitioner had therefore refused to bargain in good faith in violation of Section 8 (a) (5) and (1) of the Act (P. A. 38–40, 65–67).

3. THE BOARD'S ORDER

The Board ordered petitioner to cease and desist from the unfair labor practices found and from in any manner infringing upon its employees' exercise of their statutory rights. Affirmatively, the Board ordered petitioner to reinstate the seven unlawfully laid-off employees and make them whole for any loss of pay suffered by reason of the discrimination against them; to rescind its discriminatory seniority policy and restore all employees affected thereby to the seniority they would have enjoyed absent such discriminatory policy; to bargain with the Unions upon request; and to post appropriate notices (P. A. 40–42, 74–76).

B. THE DECISION OF THE COURT BELOW

The court below by a divided vote (Pet. App. 1–10) sustained the Board's findings and enforced its order. Rejecting petitioner's contention that its super-

seniority policy was a permissible measure to protect and continue its business like the replacement of economic strikers sanctioned by *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, the court distinguished that case on the ground that an employer is entitled to promise replacements permanent employment in order to keep his plant in operation during the strike, whereas petitioner discriminated in favor of "loyal employees" after the strike, not to keep operating but in order to penalize the strikers and discourage future strikes (Pet. App. 4–6). Distinguishing *National Labor Relations Board* v. *Potlatch Forests, Inc.*, 189 F. 2d 82 (C. A. 9), the majority of the court below found that in *Potlatch* the employer advocated its seniority policy before the strike was settled and there was no evidence that its motive was to penalize the strikers. In the instant case, however, the court stated (Pet. App. 5–6):

> Olin was clearly penalizing the strikers for exercising their right to strike and was thereby clearly discouraging any exercise of this right in the future. * * * Olin's attorney, Stull, admitted in one of the conferences with Union representatives that Olin's insistence on the superseniority plan was motivated by preference for the employees who had been loyal to Olin by helping to break the strike, and also Olin's concern that the plant be not "shut down again."

Commenting further on the opinion in *Potlatch*, the court below indicated its disagreement in any event

with the Ninth Circuit's failure to distinguish between promises of permanent tenure made during a strike in order to procure replacements and the post-strike imposition of a superseniority policy in favor of strikebreakers and against the reinstated strikers. Finally, upon the basis of the "entire course of the bargaining" as well as petitioner's insistence upon superseniority, the lower court found adequate record support for the Board's finding that petitioner had refused to bargain in good faith with the Unions.

ARGUMENT

1. Contrary to petitioner's contention (Pet. 11–12), the instant decision is not in conflict with *National Labor Relations Board* v. *Potlatch Forests, Inc.*, 189 F. 2d 82 (C. A. 9), for the court below found (Pet. App. 5–6) that petitioner's superseniority policy was motivated by a desire to penalize the strikers and discourage future strikes, whereas the court in *Potlatch* found no "discriminatory motive" (Pet. App. 17–18). That a discriminatory reason suffices to make unlawful conduct which is permissible if done for a legitimate business purpose, has long been settled by numerous decisions of this Court.[3] In *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345–347, the Court stated that an

[3] See e. g., *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45–46; *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 132; *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345–346; *National Labor Relations Board* v. *Stowe Spinning Company*, 336 U. S. 226, 233; *Radio Officers' Union* v. *National Labor Relations Board*, 347 U. S. 17, 42–44.

employer might properly refuse to reinstate replaced economic strikers as an incident of his right to "protect and continue his business" during the strike, but held that the employer's refusal to reinstate five replaced strikers was nevertheless unlawful because his motive was in fact discriminatory. The court below was therefore correct in holding that petitioner's discriminatorily motivated seniority policy was violative of the Act. Accordingly, this case does not present the question, which petitioner seeks to raise (Pet. 11–17) and which was involved in *Potlatch,* as to whether—absent such a discriminatory motive—an employer may properly reduce the seniority of reinstated economic strikers for purposes of subsequent layoffs. While the court below expressed disagreement with certain language in the *Potlatch* opinion, this affords no reason for review, since the Court "reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories,* No. 92, October Term, 1955, sl. op. 5. Moreover, the cornerstone of petitioner's argument—that as it was free to replace strikers altogether, it was free to reduce their seniority (Pet. 12–13)—is manifestly erroneous, for unless and until the striker is replaced he retains his status as an employee under Section 2 (3) of the Act, and hence retains his seniority.

Petitioner's further argument (Pet. 17–19) that its conduct did not discourage union membership in violation of Section 8 (a) (3) of the Act because the favored and penalized employees were all union members, rests on cases which preceded this Court's deci-

sion in *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 29–42. The strike to support the Unions' bargaining position was clearly union activity and the proscription of Section 8 (a) (3) includes "discrimination to discourage participation in union activities as well as to discourage adhesion to union membership" (347 U.S. at 39–40). Equally without merit is petitioner's contention, with respect to the Section 8 (a) (1) violation (Pet. 19–21), that because the strike was over when it penalized strikers to avoid a "shut down again," there was no infringement upon the exercise of the right to strike or none that was not overshadowed and justified by the restraint inherent in the loss of the strike. "If there is a reasonable likelihood that the effects may be felt years later, then a reasonable interpretation of the Act demands that the employer be deemed a violator." *National Labor Relations Board* v. *Gaynor News Company*, 197 F. 2d 719, 722–723 (C.A. 2), affirmed, 347 U.S. 17, 38, 55. Restraint upon the future exercise of a statutory right was here, as in *Gaynor*, "a natural consequence of discrimination," and petitioner is accountable for "increasing the number of workers" who would want to refrain from striking "and/or their quantum of desire" (347 U.S. 17, 38, 46).

2. Petitioner is also mistaken in the claim (Pet. 10–11) that the violation of Section 8 (a) (5) must stand or fall with the legality of the superseniority policy. The court below sustained the Board's finding of bad faith bargaining upon the basis of the "en-

tire course of the bargaining," and this evidentiary issue presents no question warranting further review by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.

THEOPHIL C. KAMMHOLZ,
General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
RUTH V. REEL,
Attorney,
National Labor Relations Board.

JULY 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956